

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6148, 6154

To be argued by
GUY MILLER STRUVE

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket Nos. 77-6148, 77-6154

duPONT GLORE FORGAN INCORPORATED, *et al.*,

Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

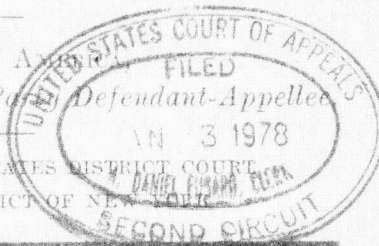
*Defendants and Third-Party
Plaintiffs-Appellees-Appellants,*

—against—

UNITED STATES OF AMERICA,

Third-Party Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF FOR DEFENDANTS AND THIRD-PARTY PLAINTIFFS-APPELLEES-APPELLANTS

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United States Court of Appeals

For the Second Circuit

DOCKET Nos. 77-6148, 77-6154

DUPONT GLORE FORGAN INCORPORATED, *et al.*,
Plaintiffs-Appellants,

—against—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
Defendants and Third-Party
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS AND THIRD-PARTY PLAINTIFFS-APPELLEES-APPELLANTS

Plaintiffs appeal from a judgment entered on August 5, 1977 by the United States District Court for the Southern District of New York, Honorable Edward Weinfeld, U.S. D.J., dismissing plaintiffs' complaint on the merits. Counts II, IV, and VI of the complaint, which sought recovery of alleged collections of excessive Federal communications excise taxes, were dismissed by the District Court on defendants' motion for partial summary judgment prior to trial, on the ground that such a tax refund action may be brought only against the United States (190a-218a; 428 F. Supp. 1297). The District Court simultaneously dismissed defendants' third-party complaint against the United States. The remaining counts of the complaint, which alleged that the

defendants had violated Section 1 of the Sherman Act and a duty alleged to arise from the Excise Tax Reduction Act of 1965, were dismissed by the District Court after a nonjury trial (100a-189a; 437 F. Supp. 1104).

Issues Presented

1. Did the District Court correctly find that the defendants did not enter into a contract, combination, or conspiracy within the meaning of Section 1 of the Sherman Act, 15 U.S.C. § 1?

2. Did the District Court correctly find that, even if defendants were found to have entered into a contract, combination, or conspiracy, their conduct did not violate Section 1 of the Sherman Act, either under the *per se* doctrine or under the rule of reason?

3. Did the District Court correctly hold that the Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965), does not contain any mandate requiring the establishment of separate Centrex station charges for exchange access and for intercommunication?

4. Did the District Court correctly hold that an action for refund of alleged collections of excessive Federal communications excise taxes must be brought against the United States, and may not be brought against a private collector which has paid such taxes over to the United States?*

Statement of the Case

Plaintiffs' Statement of the Case (Pl. Br. 5-31) is highly selective and incomplete, omitting many of the key findings of the District Court and virtually all of the evidence sup-

* If this question is not answered in the affirmative, a further question is presented: whether the dismissal of defendants' third-party complaint against the United States should be reversed insofar as the third-party complaint is based upon the tax refund claims (Counts II, IV, and VI) of plaintiffs' complaint.

porting the District Court's findings. The purpose of this Statement of the Case is to furnish a complete summary of the material facts before the District Court and the findings made by the District Court.

A. The Parties

The plaintiffs in this class action were taxable Centrex customers of one or more of the defendant operating telephone companies during the period relevant to this action (104a; 412a*). The defendants are American Telephone and Telegraph Company ("AT&T") and 23 operating telephone companies (the "defendant operating companies") (102a; 414a). The third-party defendant is the United States of America.

AT&T is a New York corporation with its principal place of business in New York, New York (414a). Through its General Department, AT&T renders advice and assistance to the defendant operating companies pursuant to License Contracts in effect between AT&T and each of the defendant operating companies (107a; 414a, 473a-474a, E1-E57). Through its Long Lines Department, AT&T participates in furnishing interstate telephone service between points served by defendant operating companies (105a n.8; 414a). AT&T does not render any intrastate telephone service (including Centrex service) (*ibid.*).

Each of the 23 defendant operating companies is an independently organized corporation, managed by its own board of directors and rendering telephone service within its own service area (105a; 415a). Each defendant operating company, within its service area, is the only telephone company which is authorized under the applicable State laws to render Centrex service (105a; 416a). The majority of the board of directors of each defendant operating com-

* Citations in the form "104a; 412a" refer to the findings of the District Court ("104a") and to the evidence supporting the District Court's findings ("412a").

pany are not and never have been employed by any defendant (415a). None of the officers or employees of any defendant operating company is an officer or employee of AT&T (*ibid.*). AT&T owns 100% of the capital stock of 16 of the defendant operating companies, a majority of the capital stock of five defendant operating companies, and a minority of the capital stock of two defendant operating companies (106a & n.12; 414a-415a, 429a-435a). An officer of AT&T is a member of the board of directors of each defendant operating company except Cincinnati Bell, Inc. (106a-107a; 415a).

Plaintiffs assert in their Statement of the Case that "the final result has to be, and is invariably, adherence to the 'advice,' 'recommendations' or what-have-you of AT&T" (Pl. Br. 11) and that "one *minimum* contract has to be: an agreement among the Bell System defendants to agree once the dust of debate and recommendations (or whatever euphemism you would use) has settled" (Pl. Br. 12). It must be emphasized that these assertions are no more than counsel's rhetoric, wholly unsupported by the record and contrary to the findings of the District Court.*

The District Court found, on the contrary, that the relationship between AT&T and the defendant operating companies under the License Contracts is one in which personnel from the operating companies seek and receive advice from their coordinates at AT&T, and personnel from AT&T seek information from their coordinates in the operating companies to assist them in developing recommendations (158a; 1213a-1214a, 1328a-1329a). While the District Court found that AT&T's advice was usually followed by the defendant operating companies, with variations to account for local situations (107a), it also found that the defendant operating companies made their own decisions as to the

* The only portions of the record alleged by plaintiffs to support these assertions (607a-615a and E87 (*see* Pl. Br. 11)) in fact have nothing to do with Centrex service (*see* 615a).

type of tariffs they would file (160a). As will be seen below, the defendant operating companies often took actions substantially at variance with the recommendations of AT&T.

B. The Initial Centrex Tariffs of the Defendant Operating Companies

Centrex service is a form of telephone service which is used by large business and other organizations. A business or other organization which has a large number of personnel at one location generally will have more than one telephone and more than one exchange access line running from its telephones to the local telephone company central office (108a-109a; 418a). Such a subscriber often finds that there are many calls between its own telephones or "stations", and desires a specific service for such intercommunication (108a, 109a; 418a). The subscriber may provide this service for itself through leased or purchased equipment, or may subscribe to intercommunication service provided by a telephone company (ibid.).

For many years prior to 1961 the defendant operating companies provided Private Branch Exchange ("PBX") service (109a; 419a). A subscriber to PBX service obtains the capability of intercommunication among the telephone stations within the subscriber's PBX system, as well as access to the telephone network through the local telephone company central office (109a-110a; 419a). PBX intercommunication service is furnished through PBX switching equipment, which is generally located on the subscriber's premises (109a; 419a). PBX exchange access service is furnished by means of "trunks", which are pairs of wires that connect the PBX switching equipment to the telephone company central office (109a-110a; 419a, 1172a-1175a).

Under the governing tariffs filed with State or local regulatory authorities, a PBX subscriber generally paid a separate monthly charge for each PBX station, for each PBX trunk, and for each item of PBX switching equipment such as selectors and connectors (110a; 420a). Such PBX rates

proved to be cumbersome and complex in operation (139a). A prospective PBX customer could not be given a satisfactory estimate of the approximate monthly charges it could expect to pay until traffic and engineering studies had determined how many PBX trunks and items of PBX switching equipment would be needed to handle the customer's expected calling requirements (140a; 1178a, 1183a-1186a).

In late 1960 and early 1961 a Task Committee of personnel from AT&T and certain defendant operating companies developed "basic principles and procedures which it would seem feasible for all Companies to follow in establishing rate treatment for Centrex Service" (135a; 1243a-1245a, E102). Recommendations embodying these principles were sent by AT&T to each of the defendant operating companies on April 28, 1961 (135a; E102-E201).

Centrex service, like PBX service, provides the capability of intercommunication among the telephone stations within the subscriber's Centrex system, as well as access to the telephone network (112a; 420a). Centrex service is characterized by direct inward dialing ("DID") and identified outward dialing ("IOD") (113a; 420a). Direct inward dialing refers to the fact that each of the unrestricted Centrex main stations ("Centrex stations") in a Centrex system is assigned its own seven-digit telephone number (*e.g.*, 791-0108), and may be dialed directly from telephones outside the Centrex system by dialing that seven-digit number (112a; 420a). Identified outward dialing refers to the ability to provide individual billing of the message unit and toll calls made by each Centrex station (111a; 420a).

The Centrex switching equipment may be located either on the customer's premises or in the telephone company central office (113a; 421a). If the Centrex switching equipment is located on the customer's premises, the service is termed Centrex-CU ("CU" standing for "Customer") (*ibid.*). If the switching equipment is located in the central office, the service is termed Centrex-CO ("CO" standing

for "Company" or "Central Office") (*ibid.*). In the case of Centrex-CU, the Centrex switching equipment on the customer's premises is connected to the telephone company central office by means of trunks, and there are typically fewer trunks than there are Centrex-CU stations (113a; 421a, 1173a-1176a). In the case of Centrex-CO, there is an individual line from the telephone company central office to each Centrex-CO station (113a; 421a).

The April 1961 AT&T Centrex rate recommendations recommended that each operating telephone company reserve the right to determine whether the Centrex service ordered by any given customer would be provided as Centrex-CU or Centrex-CO service, so as to insure that the most economical serving arrangement would be employed (138a; E102-E103, E120-E121, E147). The April 1961 AT&T recommendations explained that if an operating company did not retain the right to use the most economical serving arrangement, this would increase its average revenue requirements (and therefore its rates) for Centrex service (138a-139a; E103, E120-E121).

The April 1961 AT&T recommendations also recommended that each operating company file tariffs establishing a single monthly charge for each Centrex station, without any separate monthly charge for Centrex switching equipment, Centrex-CU trunks, and Centrex-CO lines (139a; E106, E123-E124). It was recommended that the monthly Centrex station charge for Centrex-CO be slightly higher than that for Centrex-CU, to reflect the fact that in the case of Centrex-CO the operating company provided floor space and power for the Centrex switching equipment (115a; E108). AT&T recommended the use of a single monthly Centrex station charge, instead of separate charges for stations, trunks, and items of switching equipment, primarily because such a charge was much easier to apply and to explain to customers than the more complex PBX rates (139a-140a; 1183a-1186a, 1341a-1342a, E106). Moreover, in

the case of Centrex-CO there were no separately identifiable Centrex trunks or items of Centrex switching equipment to serve as a basis for separate charges (140a; 1183a, E106).

The April 1961 AT&T recommendations further suggested that where an operating company's PBX rates were earning less than a satisfactory rate of return as a result of cost increases since such rates were established, an operating company should attempt to establish Centrex rates which would yield a satisfactory rate of return, so that Centrex service would not result in a burden upon users of basic telephone service and other services (137a; 1193a-1194a, E122). It was expected that Centrex rates would be somewhat higher than PBX rates but somewhat lower than individual business line rates (138a; E122).

The April 1961 AT&T recommendations stated that uniformity of rate approach among the operating companies would seem to be of unusual importance in the case of Centrex service, since Centrex service promised to become a "standard" service for large customers with branch organizations scattered across the country (140a-141a; E103). This recommendation was made because it was anticipated that such large customers would be aided in understanding Centrex service by having similar rate elements appear in the Centrex tariffs in the various locations in which they might wish to subscribe to Centrex service (141a; 1192a-1193a, 1298a-1305a, 1317a). AT&T expressly recognized that each operating company would determine the level of Centrex rates to be set forth in its Centrex tariffs on the basis of its own anticipated costs and local conditions, and that there would be no uniformity of Centrex rate levels among the operating companies (140a-141a; E103).

Plaintiffs assert in their Statement of the Case that the purpose of the recommended Centrex rate approach was to "narrow price differentials between the operating companies in different states" (Pl. Br. 16). Plaintiffs fail to mention that the District Court expressly found to the con-

trary. The District Court found that “[a] uniform Centrex rate structure was desired, not to fix the price for Centrex service, but to enable it to be provided as efficiently as possible and to facilitate marketing” (171a; *see also* 174a). The District Court’s finding that the purpose of the Centrex rate recommendations was not to narrow price differentials is squarely supported by the trial testimony of Robert M. Kemp of AT&T, who worked on the Centrex rate recommendations (1192a-1193a, 1298a-1305a, 1317a-1321a).*

At various times between 1961 and 1968 each defendant operating company filed tariffs covering Centrex service with State or local regulatory authorities (160a-161a; 436a-438a). In formulating their initial Centrex tariffs, the defendant operating companies made their own decisions as to the type of tariffs they would file, taking into account AT&T’s recommendations as well as other relevant factors (160a; *e.g.*, 795a-796a, 1194a-1195a, 1334a-1335a, 1415a-1417a, 1451a-1455a). The defendant operating companies did not send their proposed Centrex tariffs to AT&T for review or approval prior to filing (161a; 795a-796a, 1194a-1195a, 1334a-1335a). On the basis of all of the evidence, including the testimony at the trial, the District Court found that no representative of any operating company made any agreement to follow any of AT&T’s Centrex rate recommendations, or understood that any other operating company was committed to do so (159a-160a; *e.g.*, 795a-796a, 1194a-1195a, 1334a-1335a, 1415a-1417a, 1451a-1455a).

* Plaintiffs allege that “[c]ontemporaneous notes of the [May 1961] meeting by operating company representatives showed that ‘uniformity of rate approach—so that rates would be ‘close to each other’—was the very ‘purpose of meeting’ (E309-E329)” (Pl. Br. 17). In fact, the statement quoted appears in only one of three sets of notes of the meeting (E322), and no similar statement appears in either of the other two sets of notes. The District Court expressly found that these notes were not entitled to substantial weight, and that they were in many cases fragmentary and unclear in meaning (136a n.52). The phrase quoted by plaintiffs, for example, appears to refer to rate structure rather than (as plaintiffs argue) to rate levels.

The initial Centrex tariffs of the defendant operating companies all provided for direct inward dialing, identified outward dialing, and a single monthly Centrex station charge which covered both exchange access and intercommunication (161a; 422a). The defendant operating companies' tariffs departed in many other respects from AT&T's recommendations (161a; 439a-444a*). For example, three defendant operating companies did not offer Centrex-CO in one or more jurisdictions (*ibid.*). In many jurisdictions not all of the service features recommended by AT&T as part of the basic Centrex offering were included (161a-162a & n.73; 439a-444a). The minimum number of stations, the initial contract period, and the actual rates varied widely among the companies (162a; 439a-456a).

C. The Regulation of Centrex Service by State and Local Regulatory Authorities

The regulation of Centrex service by State and local regulatory authorities is a fact of central importance in the present case. It is undisputed that in every State in which the defendant operating companies render Centrex service, such service is subject to regulation by State or local regulatory authorities pursuant to applicable State laws (105a; 416a).** The rates of each of the defendant operating com-

* Attachment C to the Stipulation of Facts (439a-444a) analyzes the extent to which the initial Centrex tariffs filed by the defendant operating companies followed the AT&T recommendations. The word "Yes" in Attachment C indicates that the initial tariffs in question were in accord with the AT&T recommendation in the respect in question, while the word "No" indicates that the initial tariffs did not follow the AT&T recommendation. (With respect to the minimum number of stations and the initial contract period, AT&T's recommendations were 300 stations and three years (E146-E147, E153).) Inspection of Attachment C will confirm that the initial Centrex tariffs filed by the defendant operating companies varied in numerous respects from AT&T's recommendations.

** Centrex service, like ordinary residential and business telephone service, is a local telephone exchange service, not an interstate telephone service. It is undisputed that the Centrex station charges involved in the present case are not subject to regulation under the Federal Communications Act (415a).

panies for Centrex service were set forth in tariffs which were filed with State or local regulatory authorities and became effective pursuant to applicable State laws, and it is undisputed that each defendant operating company complied in all respects with such tariffs (416a).

The pervasive regulation of telephone service by State or local regulatory authorities has several consequences which are of importance in the present case. Instead of attempting to describe the law of each State in which the defendant operating companies render Centrex service—which would be impracticable within the confines of the present brief—we shall illustrate these consequences by using the example of the law of the State of New York.

Before the enactment of the telephone and telegraph article of the New York Public Service Law in 1910, L. 1910, c. 673, telephone rates and service were subject to the common law requirements that they not be unreasonable or unjustly discriminatory. *See, e.g., New York Telephone Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 507-09, 96 N.E. 199, 111 (1911). These common law requirements were entirely superseded by the telephone and telegraph article of the New York Public Service Law, which gave the New York State Public Service Commission exclusive jurisdiction over telephone rates and service. *Purcell v. New York Central R.R.*, 268 N.Y. 164, 171-72, 197 N.E. 182, 184, *appeal dismissed*, 296 U.S. 545 (1935).

Section 92(1) of the New York Public Service Law expressly requires that all charges of any telephone company for intrastate telephone service must be set forth in tariffs filed with the Public Service Commission. Section 92(2) of the Public Service Law provides that no change shall be made in any tariff charge unless and until a revised tariff has been permitted to become effective by the Public Service Commission. Section 97(1) of the Public Service Law empowers the Public Service Commission, if it finds, after a hearing held upon its own motion or upon a complaint,

that any tariff charges of a telephone company are "unjust, unreasonable or unjustly discriminatory or unduly preferential or in anywise in violation of law," to prescribe just and reasonable charges to be observed thereafter.

The New York courts have consistently held that a charge set forth in a filed and effective tariff is binding with the force of law upon both the utility and its customers unless and until a revised tariff is filed and becomes effective:

"The statute makes the specified rate as fixed uniform and lawful until changed by or with the permission of the Commission." *Purcell v. New York Central R.R.*, 268 N.Y. 164, 171-72, 197 N.E. 182, 184, *appeal dismissed*, 296 U.S. 545 (1935).

The New York courts have also held that all questions regarding the reasonableness of tariff provisions are within the exclusive jurisdiction of the Public Service Commission. *See, e.g., Ten Ten Lincoln Place, Inc. v. Consolidated Edison Co.*, 273 A.D. 903, 77 N.Y.S.2d 168 (2d Dep't), *leave to appeal denied*, 298 N.Y. 937 (1948); *People ex rel. Public Serv. Comm'n v. New York Telephone Co.*, 262 A.D. 440, 444, 29 N.Y.S.2d 513, 517 (3d Dep't 1941), *aff'd without opinion*, 287 N.Y. 803, 40 N.E.2d 1020 (1942).

The New York State Public Service Commission also has pervasive regulatory jurisdiction over complaints involving the service and procedures of telephone companies (including billing procedures) even where no attack is made on any tariff. In *Jacob Goodman & Co. v. New York Telephone Co.*, 285 A.D. 404, 137 N.Y.S.2d 797 (1st Dep't), *aff'd*, 309 N.Y. 258, 128 N.E.2d 406 (1955), a customer of the telephone company brought a purported class action attacking the method by which the company billed and collected New York City sales taxes. Despite the fact that the plaintiff was attacking the billing practices of the telephone company and not its tariffs, the courts held that the complaint was subject to the regulatory jurisdiction of the Public Service Commission, and dismissed the complaint.

In exercising its jurisdiction to prescribe just and reasonable charges for telephone service, the New York State Public Service Commission may consider all relevant factors, including the Federal communications excise taxes payable on such charges. Thus, for example, the Public Service Commission recently directed a telephone company to file revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication.* Conversely, if the Public Service Commission validly found that a proposed tariff establishing separate Centrex station charges would be unjust and unreasonable, it would have the power to prevent such a proposed tariff from going into effect.**

Any person who believes that the rates or practices of any telephone company are unjust or unreasonable in any respect—including their Federal communications excise tax effects—may request the Public Service Commission to prescribe different rates or practices. N.Y. Public Service Law § 97(1), (2). It is undisputed that no request for the establishment of separate Centrex station charges was made to any State or local regulatory authority during the period relevant to this action (424a).

* *Jamestown Telephone Corp.*, N.Y.P.S.C. Case No. 26734, Nov. 12, 1976, p. 2 (E1459). It should be noted that the Public Service Commission directed the establishment of separate Centrex station charges in that case, not in order to make the reduction in Federal communications excise taxes available to Centrex customers, but in order to raise the Centrex station charges of the telephone company involved in that proceeding (which is not one of the defendants herein) by an equivalent amount to help offset a revenue deficiency which the Commission had found to exist in the Centrex service of that telephone company. See *Jamestown Telephone Corp.*, N.Y. P.S.C. Case No. 26734, Sept. 8, 1976, pp. 2-3 (E1456-E1457).

** The Colorado Public Utilities Commission did in fact refuse to permit a revised tariff establishing separate Centrex station charges for exchange access and for intercommunication to become effective for Centrex-CO. *Mountain States Telephone and Telegraph Co.*, Colo. Pub. Utils. Comm'n Decision No. 83232, June 22, 1973, pp. 15-16 (E1449-E1450).

D. The Federal Excise Tax on Centrex Station Charges

From 1917 to 1924 and from 1932 to date, telephone service and other communications services have been subject to a Federal excise tax (115a-116a). The Federal communications excise tax is imposed upon the customers making payment for taxable services, but is required by law to be collected by the telephone company which receives such payments. 26 U.S.C. §§ 4251(a)(1), 4291. During most of the period in suit, the Federal communications excise tax was levied at a rate of 10% upon local and toll telephone service and other communications services.

The Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965), which repealed a great number of Federal excise taxes, provided that the Federal communications excise tax would be reduced from 10% to 3% on January 1, 1966, 2% on January 1, 1967, and 1% on January 1, 1968, and would be eliminated on January 1, 1969. 79 Stat. 145 (1965), 26 U.S.C. § 4251(a)(2), (b). In enacting this reduction, Congress expressly concluded that "the tax on local and toll telephone service and teletypewriter exchange service is undesirable as a permanent feature of our excise tax system." H.R. Rep. No. 433, 89th Cong., 1st Sess. 29 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1676; S. Rep. No. 324, 89th Cong., 1st Sess. 34 (1965), 1965 U.S. Code Cong. & Admin. News 1690, 1724.

For the interim period until the Federal communications excise tax was eliminated, the Excise Tax Reduction Act of 1965 enacted Section 4252(d) of the Internal Revenue Code, 79 Stat. 146 (1965), 26 U.S.C. § 4252(d), which exempted "private communication service" from the taxable category of "local telephone service". As the District Court found (116a-118a), the purpose of the "private communication service" exemption was to remove a competitive handicap from telephone company services *vis-a-vis* outside suppliers of private communication systems, which were not

subject to the Federal communications excise tax. H.R. Rep. No. 433, 89th Cong., 1st Sess. 30-31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677; S. Rep. No. 324, 89th Cong., 1st Sess. 36 (1965), 1965 U.S. Code Cong. & Admin. News 1690, 1726.

Section 4252(d) of the Code expressly provided that the term "private communication service" "does not include any communication service unless a separate charge is made for such service." The House and Senate reports on the Excise Tax Reduction Act stated that until a "separate charge" was established for the private communication service covered by the Centrex station charge, the "private communication service" exemption of Section 4252(d) would not apply. H.R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677; S. Rep. No. 324, 89th Cong., 1st Sess. 36 (1965), 1965 U.S. Code Cong. & Admin. News 1690, 1726. This passage from the House and Senate reports is set forth on pages 54-55.

On January 1, 1966 the Federal communications excise tax was reduced from 10% to 3% pursuant to the Excise Tax Reduction Act of 1965. However, the budgetary pressures of the Vietnam emergency forced a temporary restoration of the tax. The Tax Adjustment Act of 1966, which became law on March 15, 1966, restored the 10% Federal communications excise tax for the period between April 1, 1966 and March 31, 1968, but otherwise left undisturbed the scheduled repeal enacted by the Excise Tax Reduction Act of 1965. 80 Stat. 66 (1966), 26 U.S.C. § 4251(a)(2). In enacting the Tax Adjustment Act of 1966, Congress emphasized that it remained committed to the repeal of the Federal communications excise tax. H.R. Rep. No. 1285, 89th Cong., 2d Sess. 9 (1966), 1966 U.S. Code Cong. & Admin. News 1933, 1941; S. Rep. No. 1010, 89th Cong., 2d Sess. 10 (1966), 1966 U.S. Code Cong. & Admin. News 1985, 1993-94.

The Revenue and Expenditure Control Act of 1968 extended the 10% Federal communications excise tax to De-

cember 31, 1969, and provided that the tax would be reduced to 5% on January 1, 1970, 3% on January 1, 1971, and 1% on January 1, 1972, and would be eliminated on January 1, 1973. 82 Stat. 265 (1968), 26 U.S.C. § 4251(a)(2), (b). In enacting this act, Congress again expressed its determination to end the Federal communications excise tax. H.R. Rep. No. 1104, 90th Cong., 2d Sess. 8 (1968), 1968 U.S. Code Cong. & Admin. News 2341, 2348; S. Rep. No. 1014, 90th Cong., 2d Sess. 12-13 (1968), 1968 U.S. Code Cong. & Admin. News 2354, 2366.

The Tax Reform Act of 1969 postponed the scheduled reduction and repeal of the Federal communications excise tax by one year. 83 Stat. 660 (1969), 26 U.S.C. § 4251(a)(2), (b). Congress stated that it viewed the one-year continuation of the excise taxes on passenger automobiles and communications "as temporary revenue measures which are needed primarily to dampen down inflationary pressures in the period immediately ahead and to provide sufficient revenues for a balanced unified budget." H.R. Rep. No. 91-413, 91st Cong., 1st Sess., Pt. 1, at 12 (1969), 1969 U.S. Code Cong. & Admin. News 1645, 1656; S. Rep. No. 91-552, 91st Cong., 1st Sess. 15 (1969), 1969 U.S. Code Cong. & Admin. News 2027, 2042.

Finally, the Excise, Estate and Gift Tax Adjustment Act of 1970, which became law on December 31, 1970, enacted a ten-year program for the gradual repeal of the Federal communications excise tax at the rate of 1% a year, commencing on January 1, 1973. 84 Stat. 1843 (1970), 26 U.S.C. § 4251(a)(2), (b).

Thus, at all times from 1965 to the beginning of 1971, the statutes enacted by Congress and approved by the President envisioned the complete repeal of the Federal communications excise tax within a relatively short period of time, and Congress repeatedly stated that it was committed to the elimination of the Federal communications excise tax. The AT&T personnel who considered the ques-

tion of establishing separate Centrex station charges during this period, including Robert D. Weber and Robert M. Kemp, who testified at the trial, believed that Congress meant what it said (1211a-1213a, 1282a-1289a, 1343a-1347a). The District Court found that "those persons who were responsible for the decisions relating to Centrex rates, and who testified credibly at the trial, did so believe" (148a-149a).

E. Consideration of the Possibility of Establishing Separate Centrex Station Charges for Exchange Access and for Intercommunication

In 1964 and 1965 AT&T employees, including Robert D. Weber, the Exchange Rate Supervisor of AT&T who dealt with Centrex rate and tariff matters, considered the possibility of recommending to the defendant operating companies that they file revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication (141a-142a; 848a-849a, 1335a-1340a). Several methods of establishing separate charges were considered and found unsatisfactory; finally, for reasons discussed in Point F of this Statement of the Case, it was decided that AT&T should not recommend the establishment of separate charges (142a; 848a-849a, 1337a-1340a).

On December 29, 1964 Weber sent a letter to rate personnel at a number of defendant operating companies, soliciting their views on one possible method of separation (142a; 1354a-1355a, E941-E942). Some of the companies who responded orally to the letter had no strong objections, while others thought that the change should not be undertaken (142a; 839a-842a, 1355a-1357a, E941-E946, E1751-E1752). This reaction confirmed Weber's belief that a separation of charges should not be recommended, and Weber communicated this belief to the operating company personnel who responded to his letter (142a; 968a).

In October 1965, after the passage of the Excise Tax Reduction Act of 1965, there were two meetings of per-

sonnel from the defendant operating companies to explain to them the changes brought about by the Act (142a; 941a). As the District Court found (162a), these were informational meetings of "implementers", not policy-making conferences (941a). At the meeting, representatives of several defendant operating companies inquired about the possibility of establishing separate charges for exchange access and intercommunication, and were told that AT&T had no plans to recommend that such a separation be made (143a; 1358a-1359a).^{*} No agreement by any defendant operating company not to establish separate charges was sought or given (162a; 378a, 1359a-1360a).^{**}

During the period of approximately five and one half years from the enactment of the Excise Tax Reduction Act

^{*} Plaintiffs claim that the AT&T rate people announced at the October 1965 meetings that they were "adamant" against establishing separate charges (Pl. Br. 23). No such finding was made by the District Court. Plaintiffs base their claim upon a memorandum (E1408) written more than six years later by an employee of AT&T's Comptroller's Department. Plaintiffs quote this memorandum at length (Pl. Br. 28-29), and state that they "cannot understand how the District Court ignored it (and it did just that)" (Pl. Br. 28).

Plaintiffs fail to mention that the writer of this memorandum testified that "I wrote it right off the top of my head" (903a), and that his purpose in writing the memorandum was to assure his boss "that his rear was covered" and that "there was nothing that we were remiss on" (909a). When plaintiffs offered this hearsay memorandum in evidence, the District Court specifically noted that the writer "was trying to protect his boss' rear end" (913a), and stated that the case would be decided solely on the basis of probative evidence (914a). Contrary to plaintiffs' statement, the District Court did not ignore this hearsay memorandum; instead, it weighed the memorandum and found it lacking in probative value.

^{**} In a footnote to their brief (Pl. Br. 23 n.10), plaintiffs assert that AT&T recommended at the October 1965 conferences that the defendant operating companies collect Federal communications excise tax on charges which were not subject to the tax. This assertion is false. The charges in question were additional charges for each Centrex-CO station appearing in the tariffs of some of the defendant operating companies (E1117). These charges were clearly charges for "local telephone service" within the meaning of 26 U.S.C. § 4252(a), and were therefore subject to the Federal communications excise tax.

of 1965 to the end of 1970, although no Centrex customer requested any State or local regulatory authority to establish separate Centrex station charges for exchange access and for intercommunication (424a), five customers made inquiries to a defendant operating company regarding the application of the Federal communications excise tax to Centrex station charges (143a & n.58; E1252-E1307). In at least three cases the operating companies consulted with AT&T before answering that no separation would be made (143a n.58). Again, as the District Court found (162a), no commitment not to establish separate charges was ever sought by AT&T or given by any defendant operating company (*e.g.*, 968a-972a, 1222a-1223a, 1362a-1365a).

In March or April 1967 Weber transferred his Centrex rate responsibilities at AT&T to Robert M. Kemp, who also testified at the trial (1171a, 1327a). On various occasions between 1967 and the end of 1970, Kemp discussed with the people in his group at AT&T whether AT&T should recommend to the operating companies that they establish separate Centrex station charges (1206a-1207a). For reasons discussed in Point F of this Statement of the Case, Kemp decided not to make such a recommendation (*ibid.*).

During the years following the passage of the Excise Tax Reduction Act in 1965, two defendant operating companies filed their initial Centrex tariffs, and three defendant operating companies which had already filed Centrex tariffs filed initial Centrex tariffs in other States (436a-438a). All of these tariffs contained a single Centrex station charge for exchange access and for intercommunication (422a), and plaintiffs argue that "this can only be explained by the Bell System's commitment to uniformity" (Pl. Br. 22 & n.9). In fact, as the District Court expressly found (164a & n.76), it was entirely logical for these companies to adopt a rate structure which was proving successful in other

jurisdictions, and the fact that they did so gives rise to no inference of conspiracy.*

After reviewing all of the foregoing evidence, the District Court found that

“upon the totality of the relevant and probative evidence in the case, including the testimony of those witnesses who testified at the trial, which the Court accepts as credible, the plaintiffs have failed to establish their claim that the defendants entered into any conspiracy relating to Centrex rates.” (164a.)

F. The Reasons Why AT&T Did Not Recommend the Establishment of Separate Centrex Station Charges at an Earlier Date

The District Court made careful findings concerning the reasons why AT&T did not recommend the establishment of separate Centrex station charges for exchange access and for intercommunication at an earlier date (145a-156a). Since Robert M. Kemp and Robert D. Weber, both of whom testified at the trial, played a key role in deciding not to make such a recommendation earlier (848a-849a, 1206a-1207a, 1337a-1340a), both the parties and the District Court focused upon their reasons for not making such a recommendation (145a). The District Court stated that its findings were based in part upon “the trial testimony and the forthright demeanor of Kemp and Weber” (156a).

The first reason why Kemp and Weber did not make such a recommendation earlier was that the revision of the de-

* In this connection, it should be noted that many non-Bell telephone companies adopted a Centrex rate structure with a single Centrex station charge for exchange access and for intercommunication, both before and after the enactment of the Excise Tax Reduction Act of 1965. See, e.g., *McDonnell Douglas Corp. v. General Telephone Co. of California*, C.D. Cal., Civil Action No. 74-378-F, July 7, 1975, appeal pending, 9th Cir., No. 75-3131; *Jamestown Telephone Corp.*, N.Y.P.S.C. Case No. 26734, Nov. 12, 1976, p. 2 (E1459). Plaintiffs have never suggested that these companies were part of any conspiracy.

defendant operating companies' Centrex tariffs to establish separate charges for exchange access and intercommunication was expected to be a difficult, expensive, and time-consuming task, involving detailed studies, preparation and filing of new tariffs, extensive accounting and administrative changes, and retraining of personnel (145a; 1209a-1211a, 1343a).^{*} In particular, there were difficulties in developing an appropriate method for establishing separate charges for Centrex-CO (146a-147a; 923a-925a, 1349a-1351a). Since both Kemp and Weber believed that the Federal communications excise tax would expire altogether in the near future (148a-149a; 1211a-1214a, 1282a-1289a, 1343a-1347a), Kemp and Weber concluded that they would not be justified in recommending to the operating companies that they undertake the burden of establishing separate charges for the sake of a tax saving that would shortly be achieved in any event (148a; 1211a-1214a, 1344a-1347a).

Second, Kemp and Weber believed that the Centrex "package rate" structure was a good one which had been well received by customers and by regulatory commissions, and they were reluctant to recommend any change in the "package rate" structure (147a; 1209a, 1341a-1343a).

Third, Kemp and Weber had doubts whether any method chosen to establish separate charges would be acceptable to the Internal Revenue Service (147a; 1295a-1297a, 1348a).

Fourth, the District Court found that "Kemp and Weber were concerned about the possibility of an expensive, time-consuming challenge before a regulatory commission if new rates were filed" (147a). The District Court also found that "[w]hile these officials did not consider that any attack on Centrex rates would be justified or have merit, nevertheless the expense of litigating such a challenge could

^{*} The steps which were involved in the preparation, filing, and implementation of revised tariffs establishing separate Centrex station charges by each defendant operating company in 1971 and 1972 are described in Exhibit C (E1665-E1750). A review of Exhibit C will demonstrate the magnitude of the effort and expense involved.

greatly increase the costs of making the change, and the ultimate outcome was uncertain" (148a).*

Finally, as already noted, the District Court found that Kemp and Weber believed that the Federal communications excise tax would expire within a few years (148a). The District Court noted that plaintiffs had argued that AT&T's Washington Office and its tax attorneys did not share this belief, but it found that Kemp and Weber, "who testified credibly at the trial, did so believe" (148a-149a). The District Court further found that, in light of the history of Congressional action with respect to the communications excise tax, "this belief was not wholly unreasonable" (149a).

Plaintiffs argue repeatedly that "it was for selfish reasons alone" that AT&T did not recommend the separation of Centrex station charges at an earlier date (Pl. Br. 92-93; *see also, e.g.*, Pl. Br. 2, 4, 31, 55, 75, 78). This argument is wholly unsupported by any finding of the District Court, and the facts are squarely to the contrary. It is undisputed that all of the Federal communications excise taxes at issue in the present case were duly and timely paid over to the United States by the defendant operating companies which collected such taxes (425a). Plaintiffs abandoned before trial any contention that the failure to establish separate Centrex station charges was intended to, or did, in any way restrain or impede any person in competing with the Centrex service of any defendant operating company (*see* 88a-91a). On the contrary, the fact that the Federal communications excise tax was payable on the entire unseparated Centrex station charge actually disadvantaged Centrex service by comparison with alternative services, as

* Plaintiffs argue at length that these findings of the District Court are "inconsistent", and that this alleged inconsistency requires a finding that the defendants' reason for not establishing separate Centrex station charges was a fear that regulatory authorities would hold that Centrex rates were excessive and discriminatory (Pl. Br. 69-73). As shown in Point G of the Statement of the Case, this argument is utterly without merit.

plaintiffs have admitted (366a). Moreover, since AT&T and its subsidiaries together have a larger number of Centrex systems than any other taxable Centrex customer (1221a-1222a), the payment of Federal excise taxes on the total Centrex station charge resulted in a direct monetary cost to the Bell System companies.

The reasons which actuated Kemp and Weber, moreover, were not selfish reasons. The possibility that the Internal Revenue Service might raise questions regarding the Federal excise tax, and the compromising of the original objective of simplicity and customer understanding of Centrex rates, were matters directly affecting the interests of Centrex customers as well as the defendants. An increase in administrative burden, time, and expense for a defendant operating company, which may at first blush seem to affect only the selfish interests of such defendant operating company, will in the long run result in higher overall revenue requirements which must be recouped from the rates paid by telephone ratepayers generally.

Thus plaintiffs' argument that the defendants were actuated solely by selfish motives is simply contrary to fact. The District Court found, on the basis of abundant evidence in the record, that AT&T's failure to recommend the establishment of separate Centrex station charges at an earlier date was the result of legitimate business reasons (145a-151a, 163a-164a).

G. Plaintiffs' Argument That Defendants Were Motivated by the Fear That Regulatory Authorities Would Hold That Centrex Rates Were Excessive or Discriminatory

In the District Court, as in this Court, plaintiffs argued that the reason for the failure to establish separate Centrex station charges at an earlier date was a fear that regulatory authorities might hold that Centrex rates were excessive or discriminatory (151a; Pl. Br. 69-75). The District Court found that "plaintiffs' argument is based largely upon frag-

mentary excerpts from documents and testimony taken out of context" and that "[t]he totality of the evidence negates plaintiffs' contentions" (151a). After a thorough review of the evidence bearing on this issue (151a-156a), the District Court found:

"In sum, based upon the totality of the evidence, including the trial testimony and the forthright demeanor of Kemp and Weber, the Court rejects the plaintiffs' contention that the defendants' failure to file separate charges for exchange access and intercommunication after 1965 was motivated by a desire to shield Centrex rates from regulatory scrutiny." (156a.)

The District Court based this finding upon two further findings. First, the District Court found as a fact that at no time were employees of the defendant operating companies concerned that regulatory commissions might hold Centrex rates to be excessive or discriminatory (151a-152a). Second, the District Court found that there was no basis for any apprehension that Centrex rates might be held to be excessive or discriminatory (152a-156a). Both of these findings are amply supported by the evidence.

All of the defendants' witnesses testified that they had no concern during the relevant period that Centrex rates might be held to be excessive or discriminatory, and that no one from AT&T or any defendant operating company expressed such a concern to them (152a; 1214a-1219a, 1351a, 1353a, 1356a, 1421a-1424a, 1463a-1464a). Both Kemp and Weber testified that, if anything, they were concerned that Centrex rates might be too low to yield a reasonable return to the telephone companies (827a, 1214a-1215a, 1218a-1220a). The District Court expressly stated that its finding that defendants were not motivated by any desire to shield Centrex rates from regulatory scrutiny was based in part upon the trial testimony of Kemp and Weber, whom it found to be credible witnesses (156a).

The District Court found that plaintiffs had not established that there was any basis for apprehension that Centrex rates were excessive (152a). Plaintiffs argued in the District Court, as they argue here (Pl. Br. 72), that Centrex rates were vulnerable to attack as excessive because they were higher than PBX rates. This precise contention was made by the United States General Services Administration in three complaints filed with State regulatory authorities, and was rejected by every regulatory authority which passed upon it (153a & n.68; 482a-483a, E731-E872). These were the only three such challenges to the Centrex rates of the defendant operating companies during the relevant period (*see* 153a). The fact is that, to the extent that the rate of return of the defendant operating companies was higher on Centrex service than on PBX service, the reason was that PBX service was earning less than a reasonable rate of return as a result of cost increases since PBX rates were established (1193a-1194a, 1215a-1216a, E122; *see* p. 8 *supra*). The best estimates of the defendant operating companies were that their rates of return on Centrex service during this period were lower than or at best equal to the rates of return upon which their initial Centrex filings were based (*e.g.*, E1200). The District Court was plainly correct in finding that there was no basis for any contention that the defendants were motivated by a concern that Centrex rates would be found excessive (153a-154a).

The District Court further found that plaintiffs had failed to show that Centrex rates discriminated between Centrex-CU and Centrex-CO subscribers (154a). Plaintiffs argued in the District Court, as they argue here (Pl. Br. 71-73), that Centrex rates discriminated against Centrex-CU subscribers because the cost of rendering Centrex-CU service and the quality of service rendered were both lower than those of Centrex-CO. The District Court correctly found that plaintiffs had not established that the cost of rendering Centrex-CU service was in fact lower than that of Centrex-CO (154a; 1422a-1424a), and that there was no

evidence that subscribers in general were concerned about the minor differences between Centrex-CU and Centrex-CO (154a-155a; 1309a-1310a, 1424a, 1463a-1466a).^{*} Even more important, the District Court found that it is common in the telephone business to provide what is essentially the same service through different types of equipment having different cost characteristics, and to charge a single rate for the service (155a-156a; 1310a-1315a).

Plaintiffs do not seriously challenge the District Court's finding that there was in fact no basis for any apprehension that Centrex rates might be held to be excessive or discriminatory. In fact, plaintiffs repeatedly say that they are not arguing that Centrex rates were in fact excessive or discriminatory (Pl. Br. 26 n.11, 73 n.22). Plaintiffs continue to maintain, however, that defendants were motivated by a fear that Centrex rates might be excessive or discriminatory (Pl. Mem. 69-73). Plaintiffs quote a few isolated extracts from documents and testimony which they allege support this contention (Pl. Mem. 70-73). As the District Court found (151a), the excerpts quoted by plaintiffs have been taken out of context, and the totality of the evidence refutes plaintiffs' contentions.

First, plaintiffs say that Weber testified that the filing of revised tariffs might lead to a more pervasive investigation of Centrex rates by regulatory commissions (Pl. Br. 70). Plaintiffs fail to mention Weber's uncontradicted testimony that he thought that such an investigation might lead, if anything, to an increase in Centrex rates (827a), and that he had no concern that Centrex rates might be held to be excessive or discriminatory (1351a, 1356a).

Again, plaintiffs say that Kemp testified that he was concerned that the filing of revised tariffs might lead to interventions by Centrex customers or even to a proceeding

^{*} Indeed, the District Court noted that Centrex-CU equipment is used in the AT&T headquarters at 195 Broadway in New York City (155a; 1310a).

involving the overall rate of return of an operating company (Pl. Br. 70-71). In fact, Kemp testified that it was possible that Centrex customers might intervene (1256a-1257a), and that the possibility of a proceeding involving the overall rate of return of an operating company was of "a little concern" to him (1257a-1259a), but he did not testify that either of these possibilities had anything to do with his decision not to recommend the establishment of separate Centrex station charges. Again, plaintiffs fail to mention Kemp's uncontradicted testimony that he was not concerned that Centrex rates might be held to be excessive and that if anything he thought that they might be too low to yield a reasonable return (1214a-1215a, 1218a-1220a).

Plaintiffs next claim that Kemp and Arthur X. Ichter of The Bell Telephone Company of Pennsylvania, who also testified at the trial, were concerned that the use of a single composite rate for Centrex-CU and Centrex-CO might result in charges of cross-subsidization (Pl. Mem. 71-72). Plaintiffs omit to mention the Court's finding (151a n.65), supported by the uncontradicted testimony of Kemp and Ichter (1246a, 1250a-1254a, 1315a-1316a, 1468a-1473a), that this did not become a matter of possible concern until competitors began to offer the equivalent of Centrex-CU, which did not occur until 1970 or 1971 at the earliest.*

Finally, plaintiffs argue that the District Court made an "inconsistent" finding which requires a further finding that the defendants were in fact motivated by a desire to protect Centrex rates from regulatory scrutiny (Pl. Br. 69-70). In the passage from its opinion quoted by plaintiffs (147a-

* This concern, moreover, did not motivate either Kemp or Ichter not to recommend the establishment of separate Centrex station charges; indeed, they recommended the establishment of separate Centrex station charges at the same time as they were coming to be concerned about possible charges of cross-subsidization. As Ichter explained, the question of establishing separate Centrex station charges and the issue of cross-subsidization "are connected in the sense that they both involve Centrex, but they are essentially two different problems" (1473a).

148a), the District Court found that Kemp and Weber were concerned about the possibility of an expensive and time-consuming challenge before a regulatory commission if new rates were filed, and further found that

“[w]hile these officials did not consider that any attack on Centrex rates would be justified or have merit, nevertheless the expense of litigating such a challenge could greatly increase the costs of making the change, and the ultimate outcome was uncertain.” (148a.)

In fact, there is nothing “inconsistent” about this finding. The District Court expressly found that there was no evidence that any of the defendants was in fact motivated by any concern that Centrex rates were excessive or discriminatory (151a-156a), and, as shown above, the evidence squarely supports this finding. It is in no way inconsistent with this finding to observe that the ultimate outcome of any commission proceeding is necessarily uncertain; for example, Centrex rates might conceivably be held to be too low, or the Centrex rate structure might be altered in an inappropriate manner (*see, e.g.*, 827a, 1218a-1220a). Thus the “inconsistency” alleged by plaintiffs vanishes upon analysis.

The essential finding of the District Court is not subject to dispute. The District Court found, in no uncertain terms, that defendants’ failure to file separate Centrex station charges at an earlier date was not motivated by any desire to shield Centrex rates from regulatory scrutiny (156a, 171a). This finding was based, among other things, upon “the trial testimony and the forthright demeanor of Kemp and Weber” (156a). This finding was amply supported by the totality of probative evidence.

H. The Filing of Revised Tariffs Establishing Separate Centrex Station Charges for Exchange Access and for Intercommunication

On December 31, 1970 Congress enacted a ten-year program for the gradual elimination of the Federal communi-

cations excise tax at a rate of 1% a year commencing on January 1, 1973, thus establishing that the Federal communications excise tax would continue to be in effect for a substantial period of time. 84 Stat. 1843 (1970), 26 U.S.C. § 4251(a)(2), (b). Early in 1971, Kemp and his group at AT&T began to formulate a proposed recommendation to the defendant operating companies for the filing of revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication (1049a, 1223a-1224a). On September 27, 1971 AT&T sent to the defendant operating companies a letter recommending that separate charges be established and outlining a proposed method for determining the separate charges (144a; E1374-E1392).

As the District Court found (150a-151a), two changes prompted AT&T's recommendation. The first change was the ten-year extension of the Federal communications excise tax, which removed one of the major reasons why a separation had not previously been recommended (150a; 1223a-1224a, E1374). The second change was the offering by non-telephone company suppliers of equipment which competed more directly with Centrex service (150a; E1375). The imposition of the Federal communications excise tax on the entire Centrex station charge disadvantaged Centrex service by comparison with alternative services, and the impact of this disadvantage was increased by recent rulings of the Internal Revenue Service (150a-151a; 1225a-1226a, E1374-E1375).

Even before AT&T recommended the filing of revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication, several defendant operating companies had individually concluded that such revised tariffs should be filed, and had begun to prepare revised tariffs (163a; 1455a-1462a, E1348-E1357). Arthur X. Iechter testified that he independently decided that defendants The Bell Telephone Company of Pennsylvania and Diamond State Telephone Company should file

revised tariffs before he learned that AT&T was considering the same step (163a; 1455a-1462a).

The AT&T letter of September 27, 1971 suggested that the defendant operating companies follow a common method of establishing separate charges (144a; E1377). The purpose of this recommendation was to minimize the burden of any Internal Revenue Service audits of the methods of separation employed by the companies (144a; 1230a-1231a). After consideration, some of the operating companies followed the method of separation recommended by AT&T, while other operating companies decided to use different methods (144a; 1231a-1232a, 1428a-1432a, 1456a-1457a).

During 1971 and 1972 the defendant operating companies filed revised tariffs establishing separate Centrex station charges for exchange access and for intercommunication (144a; 464a-466a). In the great majority of cases the total Centrex station charge was unchanged after the separation (144a; 423a-424a). The Colorado Public Utilities Commission disapproved the revised tariffs filed by defendant The Mountain States Telephone and Telegraph Company to establish separate Centrex station charges for Centrex-CO. *Mountain States Telephone and Telegraph Co.*, Colo. Pub. Utils. Comm'n Decision No. 83232, June 22, 1973, pp. 15-16 (E1449-E1450). The other revised tariffs filed by the defendant operating companies were permitted to go into effect (144a; 464a-466a).

On June 1, 1973, after the establishment of separate Centrex station charges for exchange access and for intercommunication had been completed in every jurisdiction, the present action was commenced (2a).

ARGUMENT

POINT I

Plaintiffs' Claim for Treble Damages Under Section 1 of the Sherman Act Was Properly Dismissed.

The District Court found that plaintiffs had failed to prove that defendants entered into any contract, combination or conspiracy within the meaning of Section 1 of the Sherman Act (121a-165a). In the alternative, the District Court found that, even if defendants were found to have entered into a contract, combination, or conspiracy, their conduct did not violate Section 1 of the Sherman Act, either under the *per se* doctrine or under the rule of reason (165a-178a).

In Point I(A) below, we shall show that the findings of the District Court are governed by Rule 52(a) of the Federal Rules of Civil Procedure. In Point I(B), we shall show that the District Court correctly found that defendants did not enter into any contract, combination, or conspiracy within the meaning of Section 1 of the Sherman Act. In Points I(C) and I(D), we shall show that the District Court correctly found that, even if there were found to have been a contract, combination, or conspiracy among the defendants, it did not violate the *per se* doctrine or the rule of reason under Section 1 of the Sherman Act.

A. The Findings of the District Court Are Governed by Rule 52(a) of the Federal Rules of Civil Procedure

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

Plaintiffs argue at length that the findings of the District Court in the present case are not subject to Rule 52(a) of

the Federal Rules of Civil Procedure (Pl. Br. 37-43). This argument runs counter to the plain language of Rule 52(a) and to the decisions of this Court.

Plaintiffs argue that the "clearly erroneous" rule does not govern this case because this case "is very much a 'paper case'" (Pl. Br. 40). This argument is wholly disingenuous. The fact is that plaintiffs elected to present a paper case, but defendants did not. Defendants' case consisted primarily of the trial testimony of live witnesses, including Robert M. Kemp and Robert D. Weber of AT&T, who were claimed by plaintiffs to be "the heart and soul" of the conspiracy alleged by plaintiffs (Pl. Br. 70). The testimony of Kemp and Weber went directly to the key issues of conspiracy and motivation in this case. Both Kemp and Weber were extensively cross-examined by plaintiffs in an effort to shake their credibility (1232a-1309a, 1318a-1321a, 1365a-1405a). Finally, the District Court expressly found that Kemp and Weber testified credibly and with "forthright demeanor" (148a-149a, 156a). Under these circumstances, the "clearly erroneous" rule applies with full force to the findings of the District Court.

This Court has held that it may review *de novo* findings made by the District Court on the basis of a documentary record. *See, e.g., United States ex rel. Lasky v. LaVallee*, 472 F.2d 960, 963 (2d Cir. 1973); *Orvis v. Higgins*, 180 F.2d 537, 539-40 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950). This rule, however, applies only to cases in which the record before the District Court was entirely documentary. *See, e.g., New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 752 (2d Cir. 1977); *Pan American World Airways, Inc. v. The Aetna Casualty & Surety Co.*, 505 F.2d 989, 1004 (2d Cir. 1974). Where findings are based on demeanor testimony, as distinguished from documentary evidence, "the district judge's findings will be set aside only in exceptional circumstances." *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977); *accord, United*

States v. Aluminum Co. of America, 148 F.2d 416, 433 (2d Cir. 1945) (L. Hand, J.).

"Moreover, in an antitrust case with a vast record where much depends upon the motive and intent of the defendants, the credibility of their live witnesses below is particularly significant. [Citation omitted.]" *International Railways of Central America v. United Brands Co.*, 532 F.2d 231, 241 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949). Similarly, the issue of conspiracy in an antitrust case "is essentially one of fact" and is subject to the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.* *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1029 (2d Cir.), *cert. denied*, 429 U.S. 1097 (1977).

Thus the findings made by the District Court, far from being subject to review *de novo* as argued by plaintiffs, are subject to Rule 52(a) of the Federal Rules of Civil Procedure, and are to be reviewed with an appreciation of the importance of the District Court's opportunity to assess the demeanor of the witnesses.

* The footnote in *United States v. General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966), which is extensively quoted by plaintiffs (Pl. Br. 39-40), is not to the contrary. The issue in that case, as the Supreme Court stated in the first paragraph of the footnote, was the legal standard to be applied to undisputed facts. Despite plaintiffs' claim to the contrary (Pl. Br. 40-41), the facts in the present case are not "essentially undisputed"; they were the subject of sharp dispute, and were resolved by the District Court on the basis of its assessment of the live testimony and other evidence at the trial.

Plaintiffs also rely heavily upon *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-96 (1948), in which the Supreme Court found a conflict between the trial testimony and contemporaneous documents (Pl. Br. 41-43). There is no such conflict in the present case. As shown by the District Court's findings and the foregoing Statement of the Case, plaintiffs' further claim that "[w]ith one exception, the testimony here actually supports plaintiffs rather than defendants" (Pl. Br. 42) is ludicrously wide of the mark.

B. There Was No Contract, Combination, or Conspiracy Among the Defendants

Plaintiffs' attack upon the District Court's finding that there was no contract, combination, or conspiracy among the defendants (Pl. Br. 43-54) opens with a hornbook-style catalog of standards for determining the existence of a contract, combination, or conspiracy under Section 1 of the Sherman Act (Pl. Br. 43-45). The governing standards are set forth (more succinctly and accurately) in the opinion of the District Court (121a-124a).

Having alluded to the hornbook essentials of a contract, combination, or conspiracy, plaintiffs then state that "[h]ad the District Court considered those principles and applied them in the slightest degree, it could not have found against agreement, combination or conspiracy" (Pl. Br. 46). In the light of the careful opinion of the District Court, this statement is simply astonishing. In fact, the District Court not only considered the governing principles, but applied them conscientiously and painstakingly to the facts revealed by the record.

The essence of a contract, combination, or conspiracy is a commitment to follow a common plan of action. As the Seventh Circuit stated in *United States v. Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963),

"The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme. [Citation omitted.] It has been stated there is no such thing as an 'unwitting conspirator.' [Citation omitted.] Unless the individuals involved understood from something that was said or done that they were, in fact, committed to raise prices, there was no violation of the Sherman Act."

Similarly, this Court stated in *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976), that in order for defendants to be found to have conspired, their actions "must suggest a

commitment to a common end." *Accord, e.g., Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3d Cir. 1963); *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1268-69 (S.D. N.Y. 1976); *United States v. General Motors Corp.*, 1974-2 Trade Cas. ¶ 75,253, at 97,670 (E.D. Mich. 1974).

It is well established that consciously parallel behavior, without more, is insufficient to prove the existence of a contract, combination, or conspiracy. *See, e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954); *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975); *Kreager v. General Electric Co.*, 497 F.2d 468, 471 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974). In order to prove a contract, combination, or conspiracy, something more than mere conscious parallelism must be shown, *i.e.*, actions without a legitimate business justification which would be against the economic self-interest of each alleged conspirator unless its competitors took the same actions. *See, e.g., First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 287 (1968); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939); *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Co.*, 513 F.2d 102, 110-11 (2d Cir. 1975).

Measured against these legal principles, the facts found by the District Court fully justified its finding that there was no contract, combination, or conspiracy within the meaning of the Sherman Act. As the District Court found, the contacts between AT&T and the defendant operating companies "were in the nature of an exchange of information and advice, not of solicitation and acceptance of concerted action" (159a; *see pp. 4-5 supra*). The District Court further found that no representative of any defendant operating company made any agreement, either with AT&T or with any other defendant operating company, to follow any of AT&T's Centrex rate recommendations, or

understood that any other defendant operating company was committed to doing so (159a-160a; *see* p. 9 *supra*). The initial Centrex tariffs filed by the defendant operating companies varied in many respects from AT&T's Centrex rate recommendations (160a-162a; *see* p. 10 *supra*).

The District Court further found that no commitment not to establish separate Centrex station charges for exchange access and for intercommunication was ever sought by AT&T or given by any defendant operating company (162a; *see* pp. 17-20 *supra*). Moreover, the District Court found that the defendant operating companies exercised independent judgment in connection with the establishment of separate Centrex station charges for exchange access and for intercommunication in 1971 and 1972 (162a-163a; *see* pp. 28-30 *supra*). This independent judgment was vividly illustrated by the testimony of Arthur X. Ichter of The Bell Telephone Company of Pennsylvania and Kenneth A. Hamming of Michigan Bell Telephone Company detailing the reasons why their companies did not follow certain of AT&T's Centrex rate recommendations (1415a-1417a, 1430a-1432a, 1453a-1462a).

The District Court recognized that the defendant operating companies did not file revised tariffs establishing separate Centrex station charges until 1971 or 1972, but correctly held that such behavior does not establish the existence of a conspiracy unless it is shown that such behavior lacked a legitimate business justification and was against the separate interest of each individual defendant (123a-124a, 163a; *see* p. 35 *supra*). The District Court further found that it was not against the interests of each individual defendant to maintain the "package rate" for Centrex, and that there were legitimate business reasons for doing so, including the widespread acceptance of Centrex rates, their ready marketability, the burden of filing new tariffs, the possibility of a time-consuming and costly challenge before regulatory commissions or by the Internal

Revenue Service, and the expected elimination of the communications excise tax (163a-164a; *see pp. 17-23 supra*).*

On the basis of the foregoing findings, the District Court found that "upon the totality of the relevant and probative evidence in the case, including the testimony of those witnesses who testified at the trial, which the Court accepts as credible, the plaintiffs have failed to establish their claim that the defendants entered into any conspiracy relating to Centrex rates" (164a). As shown by the facts summarized above, this finding is fully supported by the record, and is not rebutted by plaintiffs' highly selective and one-sided presentation of isolated facts allegedly pointing to the existence of a contract, combination, or conspiracy (Pl. Br. 46-53).

C. The *Per Se* Rule Has No Application to the Present Case

Plaintiffs argue that, if there was a contract, combination, or conspiracy among the defendants not to establish separate Centrex station charges for exchange access and for intercommunication, it constituted a *per se* violation of the rule against price fixing under Section 1 of the Sherman Act (Pl. Br. 56-64). The District Court rejected this argu-

* Plaintiffs argue that by making this finding, the District Court attributed the motives of Kemp and Weber to all of the defendant operating companies, and therefore must have admitted *sub silentio* the existence of a conspiracy (Pl. Br. 54). This argument is without merit. The existence of legitimate business reasons, which was established by the testimony of Kemp and Weber as well as by other evidence, destroys any inference of conspiracy without the necessity of adducing repetitive testimony as to reasons from each of the defendant operating companies.

Plaintiffs' further argument that defendants should have called at least one witness from each of the 23 defendant operating companies (Pl. Br. 50, 54) would have resulted only in needless prolongation of the trial. AT&T was the hub of the conspiracy alleged by plaintiffs. Defendants therefore called Kemp and Weber, who were the "heart and soul" of the conspiracy charged by plaintiffs (Pl. Br. 70), and the District Court found that their testimony, together with the other evidence in the case, negated the existence of any conspiracy (164a).

ment (165a-172a), both because the defendants do not compete (and cannot lawfully compete) in rendering Centrex service, and because there was in fact no fixing of Centrex rate levels.

It is undisputed that each of the defendant operating companies, within its service area, is the only telephone company which is authorized under the applicable State laws to render Centrex service (416a). Moreover, it is undisputed that AT&T does not render Centrex service (414a). Thus it is undisputed that none of the defendants is (or legally could be) in competition with any other defendant in the rendition of Centrex service.

The rule against horizontal price fixing under Section 1 of the Sherman Act applies to price fixing among competing sellers of goods and services, and does not apply to agreements as to prices between noncompeting sellers.* As Justice Stone stated in his opinion for the Court in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 500 (1940),

"In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. . . ." (Footnote omitted.)

All of the cases which have developed and applied the rule against horizontal price fixing under Section 1 of the Sherman Act involved price fixing among competing sellers. Indeed, the reason for the condemnation of horizontal price

* Plaintiffs suggest at one point that if they are unable to establish a horizontal price fixing agreement, they may allege a vertical price fixing agreement (Pl. Br. 61). As the District Court observed (166a-167a n.78), this suggestion is wholly without merit, because vertical price fixing agreements are agreements between a supplier and its customers regarding resale prices, and AT&T does not supply Centrex service to anyone, let alone the defendant operating companies (414a).

fixing is that it reduces or eliminates price competition among competing sellers. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 401 (1927). Where the parties to an agreement are not in competition, there is no such effect upon price competition.

In every reported case we have found in which it has been argued that an alleged horizontal agreement as to prices between noncompeting sellers violated Section 1 of the Sherman Act, the courts held that such an agreement did not violate Section 1 of the Sherman Act, either under the *per se* rule or under the rule of reason.* See *Evans v. S. S. Kresge Co.*, 544 F.2d 1184, 1192-96 (3d Cir. 1976), *cert. denied*, 430 U.S. 953 (1977); *Call Carl, Inc. v. BP Oil Corp.*, 403 F. Supp. 568, 572-73 (D. Md. 1975), *aff'd in part and rev'd in part on other grounds*, 554 F.2d 623, 628 n.4 (4th Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3244 (Oct. 11, 1977); *Seligson v. The Plum Tree, Inc.*, 361 F. Supp. 748, 754-55 (E.D. Pa. 1973); *United States v. Columbia Pictures Corp.*, 169 F. Supp. 888, 893-94 (S.D.N.Y. 1959), 189 F. Supp. 153 (S.D.N.Y. 1960); cf., e.g., *Austin v. House of Vision, Inc.*, 404 F.2d 401, 403 (7th Cir. 1969); *Graham v. Hudgins, Thompson, Ball and Associates, Inc.*, 319 F. Supp. 1335, 1337 (N.D. Okla. 1970); *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 720-21 (D. Hawaii 1964), *aff'd per curiam*, 401 F.2d 182 (9th Cir.

* The cases cited by the District Court (133a-134a) and by plaintiffs (Pl. Br. 61) for the abstract proposition that an agreement among noncompetitors may violate Section 1 of the Sherman Act do not contradict this principle, because those cases did not involve alleged horizontal price-fixing conspiracies between noncompeting sellers. All of the cases in point hold that alleged conspiracies of this kind do not violate the Sherman Act.

A closely related principle of antitrust law is that agreements between affiliated corporations which merely limit competition that might otherwise exist between them do not violate Section 1 of the Sherman Act. The authorities supporting this principle are set forth in Defendants' Post-Trial Memorandum (Record Item 363), pp. 42-45. The District Court's holding that affiliated corporations are legally capable of conspiring (131a-133a) does not gainsay this principle.

1968), *cert. denied*, 393 U.S. 1086 (1969); *Beisser v. Wellin*, 1975-2 Trade Cas. ¶ 60,612, at 67,690-91 (S.D.N.Y. 1975).

For example, in *United States v. Columbia Pictures Corp.*, 169 F. Supp. 888 (S.D.N.Y. 1959), the Government argued that a joint distribution agreement between two motion picture producers was a price fixing agreement in violation of Section 1 of the Sherman Act. The court rejected this argument because the Government had not established that the two producers were competitors:

"Thus, by the use of reason, logic and experience, it has been declared that agreements between competitors to fix prices [citation omitted]; to allocate territory [citation omitted]; to tie in on sale patented with unpatented products [citation omitted]; and to boycott other competitors [citation omitted], are unlawful without occasion or necessity for further judicial factual inquiry. Such contractual restraints agreed to by competitors, actual or potential, have been labelled 'per se' violations of Section 1. However, before we may say that such agreements are inherently unlawful, we must find that the agreements were made between competitors, actual or potential, dealing in competing products in a relevant market. . . ." 169 F. Supp. at 893.

Plaintiffs argue that the absence of competition between the defendant operating companies is irrelevant because, plaintiffs argue, the defendants were concerned that any action affecting the Centrex rates of one company might lead one or more regulatory authorities to take actions which could in turn affect the Centrex rates of other companies (Pl. Br. 57-58). The District Court, however, found as a fact that there was no such concern (175a-176a). Quite aside from this, plaintiffs' speculative chain of might-have-beens is insufficient to satisfy the requirement of a restraint upon competition under Section 1 of the Sherman Act.

Plaintiffs have not cited a single case which holds that such an attenuated and speculative chain of causation is

sufficient to establish a violation of Section 1 of the Sherman Act. Even less attenuated chains of speculative causation have been held insufficient to establish a violation of Section 1 of the Sherman Act. For example, in *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977), the plaintiffs argued that the defendants conspired to misrepresent the flammability characteristics of their product in order to permit it to be sold at higher prices. The courts held that this argument did not establish a violation of Section 1 of the Sherman Act.

In addition to the absence of any element of competition among the defendants, there was no fixing of prices within the meaning of Section 1 of the Sherman Act. The District Court found that the alleged conspiracy related only to rate structure, and did not limit the pricing decisions of any operating company (169a).^{*} The undisputed facts establish that there was absolutely no uniformity in the Centrex station charges of the defendant operating companies (169a; 445a-456a). For example, Attachment D to the Stipulation of Facts (445a-450a) sets forth the Centrex station charges of the defendant operating companies in effect on January 1, 1963. On that date, the charges of the defendant operating companies for the minimum number of Centrex stations ranged from \$6.30 to \$11.50 per station (446a, 447a), and the minimum number of Centrex stations ranged from 100 to 500 (447a, 449a-450a). Attachment E (451a-456a) shows that the range of Centrex station charges was even wider on January 1, 1966. On that date, the charges of the defendant operating companies for the minimum number of Centrex stations ranged from \$6.30 to \$16.50 per station (452a-453a).

^{*} Plaintiffs assert that the defendants sought in 1961 to avoid disparities in Centrex rate levels (Pl. Br. 61-62). This assertion is contrary to the express finding of the District Court and to the evidence in the record (169a, 171a; see pp. 8-9 *supra*).

Finally, plaintiffs appear to contend that even if the alleged conspiracy did not fix the overall level of Centrex rates of the defendant operating companies, it did fix the amount of Federal communications excise taxes levied upon such rates (Pl. Br. 63). This contention likewise fails to establish the existence of an agreement to fix prices in violation of Section 1 of the Sherman Act, for two distinct reasons.

In the first place, the agreement alleged by this contention would be an agreement with respect to a Federal tax, not an agreement to fix prices. Federal communications excise taxes do not constitute part of the charge for telephone service; rather, they are taxes which are levied upon the total charge for taxable telephone service. 26 U.S.C. § 4251(a)(1). It is undisputed that all of the Federal communications excise taxes at issue in the present case were paid over in full to the United States (425a). No case has been found in which the Sherman Act rule against price fixing has been applied to an agreement with respect to a tax, and plaintiffs have failed to cite any such case. As the District Court held, "[u]nder these circumstances, any agreement among the defendants to establish a uniform rate structure, which had as an incidental effect an increase in the tax paid by customers, cannot by reason of the tax increase alone constitute price fixing" (170a).

In the second place, there can be no contention that the alleged agreement to collect a higher federal excise tax from Centrex customers was intended to bring about, or did in fact bring about, any uniformity (or even any increased degree of uniformity) in the overall level of Centrex rates. The sole result of the alleged conspiracy was that the manner in which Federal communications excise taxes were imposed on Centrex station charges remained the same after January 1, 1966, when the Excise Tax Reduction Act of 1965 took effect, as it had been before January 1, 1966. As has already been noted, the Centrex

station charges of the defendant operating companies on January 1, 1966 exhibited no uniformity whatever, and the range of variation in the Centrex station charges was much greater than the total Federal communications excise tax on the Centrex station charges (*see* p. 41 *supra*).*

An agreement fixing one component of a total price does not violate Section 1 of the Sherman Act unless it has either the purpose or the effect of fixing or stabilizing the total price.** This was established in *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 95-96 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231, 1239-40 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976). *See also, e.g., Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962, 965-67 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *Boston Professional Hockey Ass'n Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 360 F. Supp. 459, 467-68 (N.D. Tex. 1973), *aff'd in part and rev'd in part on other grounds*, 510 F.2d 1004, 1014 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975).

Jacobi involved the interim service charge of \$15 per transaction which was adopted by the New York Stock Exchange in 1970. The Exchange Constitution and Rules then in effect prohibited the inclusion of the service charge in the base on which the commission income of registered

* On January 1, 1966 the Centrex station charges of the defendant operating companies for the minimum number of Centrex stations ranged from \$6.30 to \$16.50 (452a, 453a). At a 10% Federal excise tax rate, the tax on these Centrex station charges ranged from \$0.63 to \$1.65. The range of variation in the Centrex station charges (from \$6.30 to \$16.50, or \$10.20) was more than six times as great as the maximum Federal excise tax (\$1.65).

** As explained in *Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962, 966 & n.2 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977), the price fixing cases relied upon by plaintiffs (Pl. Br. 56-57, 62) were cases in which there was an actual purpose to fix or stabilize the total price paid by customers. *See, e.g., National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 426 (7th Cir. 1965); *United States v. Gasoline Retailers Ass'n, Inc.*, 285 F.2d 688, 691 (7th Cir. 1961); *Plymouth Dealers Ass'n of Northern California v. United States*, 279 F.2d 128, 132 (9th Cir. 1960).

representatives was computed. The plaintiffs in *Jacobi* contended that this constituted an agreement fixing the compensation of registered representatives in violation of Section 1 of the Sherman Act. The District Court rejected this contention, and found that the agreement attacked in *Jacobi* did not violate Section 1 of the Sherman Act:

"[T]he rule prohibiting sharing the service charge with registered representatives was designed primarily to enable member firms to retain needed revenue, furthering the purpose which prompted imposition of the service charge, rather than to achieve any uniformity or reduction in the compensation of registered representatives. The effect of the requirement may have been in part that the registered representatives received, in general, less money than they would have absent the prohibition, although this has not been conclusively demonstrated. There was no stabilizing effect on wages, however, and no greater degree of uniformity in the compensation of registered representatives after the service charge was imposed than before. . . ." 377 F. Supp. at 96 (footnote omitted).

This Court, in affirming the District Court in *Jacobi*, held on the basis of the foregoing findings of fact that "there was no fixing of compensation of registered representatives in general" 520 F.2d at 1240.

In the present case, as in *Jacobi*, there was no greater degree of uniformity in overall Centrex station charges after the inception of the alleged conspiracy than before, and there was no stabilizing effect on Centrex station charges. It follows that the alleged conspiracy was not a conspiracy to fix or stabilize prices in violation of Section 1 of the Sherman Act.

D. There Was No Violation of the Rule of Reason

In addition to finding that the *per se* doctrine had no application in the present case, the District Court found

that 'here was no violation of the rule of reason (172a-178a). Although plaintiffs vehemently assail this finding (Pl. Br. 64-75), it was entirely correct.

The rule of reason, as the District Court noted (172a-173a), requires a detailed consideration of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); accord, e.g., *White Motor Co. v. United States*, 372 U.S. 253, 261-62 (1963); *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 883-85 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969).

The District Court found, on the basis of a number of factors, that plaintiffs had failed to show that the alleged conspiracy had any substantial anticompetitive effect (173a-176a). The first factor relied on by the District Court was the fact that the alleged agreements "did not restrict any operating company's ability to offer Centrex at whatever price it desired with whatever service features it desired, or even not to offer Centrex at all, as the tariffs actually filed demonstrate" (174a).^{*} This finding is amply justified by the record (*see pp. 41-43 supra*), and furnishes strong support to the District Court's conclusion that the rule of reason was not violated. *See Jacobi v. Bache & Co.*, 377 F. Supp. 86, 96 (S.D.N.Y. 1974), *aff'd*, 520 F.2d 1231, 1239-40 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976), and other authorities cited on page 43 above.

The second factor relied upon by the District Court was the fact that the Centrex service rendered by each of the defendant operating companies is regulated by State or local regulatory authorities, which are empowered to assure

^{*} Plaintiffs' rejoinder to this factor is that "[d]efendants' [alleged] agreement surely shackled customer choice" (Pl. Br. 67). In making this rejoinder, plaintiffs have forgotten that all of the defendant operating companies are pervasively regulated public utilities which are legal monopolies within their respective service areas (416a).

the fairness and reasonableness of the Centrex tariffs of the defendant operating companies (174a-175a; see pp. 10-13 *supra*). It is undisputed that each defendant operating company complied in every respect with such Centrex tariffs (416a).

Substantial authority supports the principle that the Federal antitrust laws do not apply to conduct of a public utility which is in accord with its applicable tariffs filed with State or local regulatory authorities.* In particular, defendants relied below upon the holding of *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922), that damages may not be recovered in an antitrust case for an alleged conspiracy by public utilities to file uniform tariff rates, a holding which has been repeatedly reaffirmed and applied by the Supreme Court and other Federal courts. See, e.g., *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 453 (1945); *Ditlow v. Pan American World Airways, Inc.*, 1976-1 Trade Cas. ¶ 60,867 (D.D.C. 1975), *aff'd per curiam*, D.C. Cir., Jan. 6, 1976, *cert. denied*, 426 U.S. 949 (1976); *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506, 513 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972); *Ellingson Timber Co. v. Great Northern Ry.*, 424 F.2d 497, 498 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Monticello Heights, Inc. v. Morgan Drive Away, Inc.*, 1974-2 Trade Cas. ¶ 75,282, at 97,861-62 (S.D.N.Y. 1974). The District Court ruled that it need not reach the question whether these authorities furnished an absolute defense to plaintiffs' antitrust claim, since it found that that claim failed on other grounds (178a-179a n.95).** *A fortiori*, however, these authorities strongly

* See Defendants' Post-Trial Memorandum (Record Item 363), pp. 46-52 and authorities cited.

** The District Court suggested that the principle of *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), may be limited to Federal regulatory agencies (179a n.95). The *ratio decidendi* of *Keogh*, however, applies equally to any regulatory agency with which binding tariffs are filed (see 260 U.S. at 163), and *Keogh* has been followed with respect to utilities regulated by State as well as Federal regulatory agencies. See, e.g., *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506, 513 (6th Cir.), *cert. denied*, 409 U.S. 1001 (1972).

support the District Court's finding that the rule of reason was not violated.* This is particularly true where, as here, the members of the plaintiff class completely failed to avail themselves of the regulatory remedies open to them (424a).**

The final factor relied upon by the District Court in finding that there was no restraint upon competition was the fact that there was no competition among the defendants to be restrained (175a). As shown in Point I(C) above, this factor is decisive in establishing the inapplicability of the *per se* doctrine. It is equally decisive in establishing the absence of any violation of the rule of reason, because the courts have consistently held that agreements between noncompeting sellers do not violate either the *per se* doctrine or the rule of reason. See *Evans v. S. S. Kresge Co.*, 544 F.2d 1184, 1192-96 (3d Cir. 1976), *cert. denied*, 430 U.S. 953 (1977), and other authorities cited on pages 39-40 above.

In addition to finding that the alleged conspiracy did not have any anticompetitive effect, the District Court found that it did not have any anticompetitive purpose (177a-178a). With respect to the alleged conspiracy to adopt a uniform Centrex rate schedule, the Court found that defendants were motivated by a desire to provide Centrex service in the most efficient manner possible, and that the ultimate beneficiaries of this effort were the subscribers of the defendant operating companies (177a-178a). The record amply supports this finding (*see pp. 7-9 supra*). With respect to the alleged conspiracy not to establish

* Plaintiffs attempt to diminish the significance of the pervasive regulation of Centrex service by arguing that public utility commissions failed to act unless a complaint was made to them (Pl. Br. 67-68). The District Court correctly found that "[n]othing has been presented to support this claim" (175a). Plaintiffs attempt to supply this lack of proof by citing secondary materials (Pl. Br. 68), but such materials cannot take the place of probative evidence in the record. Moreover, the record demonstrates active and effective supervision by State regulatory authorities (*e.g.*, E330-E334, E360-E367, E845-E873, E1455-E1461).

** See Defendants' Post-Trial Memorandum (Record Item 363), pp. 53-55 and authorities cited.

separate Centrex station charges for exchange access and for intercommunication, the District Court found that "the reason Centrex charges were not separated immediately after passage of the Act was not to attempt to shield excessive or discriminatory rates, but to try to prevent unnecessary expenditures in connection with the filing of new tariffs" (178a). Again, the record amply supports this finding (*see pp. 20-28 supra*).

The bulk of plaintiffs' appellate argument on the rule of reason issue is devoted to an attempt to reargue these factual findings (Pl. Br. 69-75). Plaintiffs' factual arguments have been answered in the foregoing Statement of the Case (*see pp. 20-28 supra*). As the District Court found, "plaintiffs' argument is based largely upon fragmentary excerpts from documents and testimony taken out of context" and "[t]he totality of the evidence negates plaintiffs' contentions" (151a).

E. Conclusion

Despite plaintiffs' repeated efforts to force this case into the mold of an antitrust case, the fact remains that the conspiracy alleged by plaintiffs in this case has none of the hallmarks of a violation of Section 1 of the Sherman Act. Section 1 of the Sherman Act is directed at agreements restraining competition, but the defendants are regulated public utilities which do not (and legally cannot) compete in the rendition of Centrex service. Section 1 of the Sherman Act is concerned with the fixing or stabilizing of prices, but, as the District Court found, there was no such fixing or stabilizing in the present case. Section 1 of the Sherman Act is directed at agreements having an anticompetitive purpose and effect, but the District Court correctly found that defendants' actions were taken for good faith business reasons and had no such purpose or effect.

For all the foregoing reasons, the District Court correctly found that plaintiffs had failed to establish any of the

essential elements of a violation of Section 1 of the Sherman Act.* Accordingly, the District Court's dismissal of plaintiffs' antitrust claim was fully justified.

POINT II

Plaintiffs' Claim That the Excise Tax Reduction Act of 1965 Contained a Mandate to Establish Separate Centrex Station Charges Is Without Merit.

Plaintiffs argue that the Excise Tax Reduction Act of 1965, 79 Stat. 136 (1965), embodied a mandate to the defendant operating companies to establish separate Centrex station charges for exchange access and for intercommunication "within a reasonable time" (Pl. Br. 77-93). The District Court, after a careful examination of plaintiffs' claim, held that the Excise Tax Reduction Act contained no such mandate (179a-188a).**

* In light of its finding that plaintiffs had failed to establish any of the essential elements of a Sherman Act claim, the District Court did not reach a number of other defenses and failures of proof which would also have required the same result. (Plaintiffs' request that judgment be entered in their favor on the issue of liability (Pl. Br. 76, 100) ignores this fact.) Among the issues not reached by the District Court were: (1) plaintiffs' failure to show any effect upon interstate commerce (179a n.95; Defendants' Post-Trial Memorandum (Record Item 363), pp. 29-30), (2) the fact that Centrex rates were set forth in filed and binding tariffs (178a-179a n.95; Record Item 363, pp. 46-52), and (3) the fact that plaintiffs were not injured in their business or property as required by Section 4 of the Clayton Act, 15 U.S.C. § 15 (179a n.95; Record Item 363, pp. 52-56).

Among other issues not reached by the District Court, which apply both to plaintiffs' antitrust claim and to their claim under the Excise Tax Reduction Act of 1965, were: (1) improper venue as to 19 of the defendant operating companies (183a n.121; Record Item 363, pp. 99-104), (2) impropriety of retrospective application of the novel theories of liability asserted by plaintiffs (Record Item 363, pp. 89-90), (3) plaintiffs' lack of standing to represent customers of 21 defendant operating companies (Record Item 363, pp. 91-98), and (4) the applicable statutes of limitations and laches (Record Item 363, pp. 105-107).

** The same result was reached in *McDonnell Douglas Corp. v. General Telephone Co. of California*, C.D. Cal., Civil Action No. 74-

Plaintiffs' mandate theory is rebutted by the structure of the Federal communications excise tax laws (Point II(A) below), by the language of the Excise Tax Reduction Act of 1965 (Point II(B)), by the legislative history of the 1965 Act (Point II(C)), and by the fact that Congress has spoken explicitly in those few instances where it has wished to prescribe the public utility rate consequences of a tax measure (Point II(D)). The constitutional and other arguments upon which plaintiffs rely fail to support their mandate theory (Point II(E)).

A. The Federal Communications Excise Tax Is Levied Upon the Tariff Charges Approved by Regulatory Authorities

It is well established that the Federal communications excise tax laws are based upon the tariff charges which have been approved by the appropriate regulatory authorities, and are not intended to mandate the adoption of any particular form of tariff charges by such regulatory authorities. This was the square holding of *Carrigan v. Sunland-Tujunga Telephone Co.*, 263 F.2d 568 (9th Cir.), *cert. denied*, 359 U.S. 975 (1959), which was decided more than six years before the enactment of the Excise Tax Reduction Act of 1965.

At the time the *Carrigan* case arose, the Federal communications excise tax law defined "long distance telephone service" as encompassing calls for which a toll charge of more than 24 cents was made, and defined "local telephone service" as any telephone service not taxable as "long distance telephone service." The plaintiff in the *Carrigan* case argued that the tariff charges approved by State and local

378-F, July 7, 1975, *appeal pending*, 9th Cir., No. 75-3131. The actions of the Colorado and New York Commissions, respectively denying permission to establish separate Centrex-CO station charges and directing that the Centrex station charges be raised to offset the tax savings (*see* p. 13 *supra*), are likewise inconsistent with plaintiffs' mandate theory.

regulatory authorities were required to conform to these definitions, and that any calls for which a toll charge of less than 24 cents was made should therefore be covered by the tariff charge for local telephone service.

The *Carrigan* court rejected this argument, and held that the Federal communications excise tax law "had nothing to do with fixing the rates, but was on them as fixed":

"The fundamental legal question with respect to appellant's alleged claim is whether §§ 4251, 4252 and 4254 of the Int. Rev. Code limit state public utilities commissions in establishing schedules for intrastate telephone calls.

The District court judge concluded they do not. We agree.

The Internal Revenue Code imposed federal taxes, as it had a right to do. The Commission fixed the telephone rates, as it had a right to do. The Commission's rates had nothing to do with the federal tax and the federal tax had nothing to do with fixing the rates, but was on them as fixed." 263 F.2d at 571.

The holding of *Carrigan v. Sunland-Tujunga Telephone Co.* is that Federal communications excise taxes are imposed upon the telephone rates fixed by the appropriate regulatory authorities. These rates, as the *Carrigan* court expressly noted (263 F.2d at 570, 571), are set forth in the tariff schedules filed with such regulatory authorities. As explained above (pp. 10-12), all of the charges of any telephone company for any telephone service are required by law to be set forth in effective and binding tariffs. In enacting the Excise Tax Reduction Act of 1965, Congress was well aware that charges for telephone service are subject to the jurisdiction of regulatory authorities. *See, e.g.*, 111 Cong. Rec. 12330 (1965) (remarks of Rep. Pucinski); 111 Cong. Rec. 13624-25 (1965) (remarks of Sen. Long). For all these reasons, the District Court correctly held that the term "separate charge", as used in Section 4252(d)

of the Internal Revenue Code, means a separate tariff charge (145a-146a n.61).*

The conclusion that a "separate charge" within the meaning of Section 4252(d) is a separate tariff charge also represents the position of the Internal Revenue Service. In a memorandum of technical advice dated August 8, 1968 (E1330-E1331), which was furnished to defendants (E1329, E1332), the National Office of the IRS expressly ruled that this language referred to a separate tariff charge:

"It is indicated in the report that until such a separation of charges is made, the exemption will not apply in the case of Centrex service. From this explanation, it is apparent the Committee was making a distinction based on tariff charges. The term 'tariff' when used in connection with a public utility, such as a telephone company, pertains to a schedule of charges."** (E1331.)

In light of the holding in *Carrigan v. Sunland-Tujunga Telephone Co.* that the Federal communications excise tax applies to the tariff charges which have been approved by the appropriate regulatory authorities, if Congress had harbored any intent to mandate the use of any particular form of charges for Centrex service in the Excise Tax Reduction Act of 1965, it would have expressed this intent in unequivocal terms in the language of the Act itself.

* Plaintiffs do not appear seriously to challenge this holding. Although plaintiffs reiterate in passing their argument, made at great length to the District Court, that the "separate charge" requirement of Section 4252(d) could be met by a "bookkeeping allocation" on the books of the telephone company (Pl. Br. 84 n.27, 93), plaintiffs do not attempt to rebut the careful reasoning supporting the contrary holding of the District Court (145a-146a n.61), and do not even mention the contrary position of the Internal Revenue Service.

** On the basis of its ruling that a "separate charge" means a separate tariff charge, the IRS National Office ruled that the "separate charge" was not required to be shown on the customer's bill (E1331). The latter ruling was embodied in Rev. Rul. 69-152, 1969-1 Cum. Bull. 289.

B. The Plain Language of the Excise Tax Reduction Act of 1965 Refutes Plaintiffs' Mandate Theory

As noted above (pp. 14-15), the Excise Tax Reduction Act of 1965 amended Section 4252(a) of the Internal Revenue Code so as to exempt "private communication service", as defined by Section 4252(d), from the definition of "local telephone service" subject to the Federal communications excise tax. Section 4252(d) provides that the tax-exempt category of "private communication service" "does not include any communication service *unless* a separate charge is made for such service." (Emphasis supplied.)

Plaintiffs' mandate theory boils down to a contention that, by providing in Section 4252(d) that Centrex intercommunication service would not qualify as a tax-exempt "private communication service" "unless a separate charge is made for such service", Congress meant to mandate that a separate charge be made for Centrex intercommunication service. The language of Section 4252(d) simply will not bear this interpretation. Section 4252(d) does not provide that a telephone company "will" or "shall" make a separate charge for any service which would, if separately charged, qualify as a "private communication service" within the meaning of Section 4252(d). Rather, Section 4252(d) simply provides that a service will not qualify as a "private communication service" "*unless* a separate charge is made for such service" (emphasis supplied).

The word "unless" cannot be construed as embodying a Congressional mandate. The word "unless" is plainly and unambiguously a conditional term, not a mandatory one. None of the dictionary definitions of the word "unless" suggests that the word can be used in a mandatory or directive sense. *See, e.g.*, 2 Oxford English Dictionary 3521 (Compact ed. 1971); Webster's New International Dictionary 2503 (3d ed. 1971). Similarly, judicial decisions construing the term "unless" have consistently held that it is

conditional and not mandatory. *See, e.g., Joyce v. Wyant*, 202 F.2d 863, 864-65 (6th Cir. 1953); *McCrabb v. Moulton*, 124 F.2d 689, 691 (8th Cir. 1942); *Gloyd v. Midwest Refining Co.*, 62 F.2d 483, 485 (10th Cir. 1933). For example, *McCrabb v. Moulton*, 124 F.2d 689 (8th Cir. 1942), dealt with an oil and gas lease assignment which provided that the assignee should reassign the leases to the assignor on a given date "unless on or before said date he shall begin the actual drilling in good faith" The court held that this provision imposed no obligation upon the assignee to begin drilling.

C. The Legislative History of the Excise Tax Reduction Act of 1965 Rebuts Plaintiffs' Mandate Theory

The House and Senate Committee reports on the Excise Tax Reduction Act of 1965 explained that the purpose of the tax exemption for "private communication service" was to remove a competitive handicap from telephone company services *vis-a-vis* outside suppliers of private communication systems, which were not subject to the Federal communications excise tax. H.R. Rep. No. 433, 89th Cong., 1st Sess. 30-31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677; S. Rep. No. 324, 89th Cong., 1st Sess. 36 (1965), 1965 U.S. Code Cong. & Admin. News 1690, 1726. The Committee reports also contained a paragraph referring expressly to Centrex service, which reads as follows:

"For the reasons indicated above, your committee's bill provides an exemption from the tax on local telephone service for private communications service if a separate charge is made for this service. It is understood that private lines and PBX systems generally will immediately qualify for this exemption. However, it is understood that Centrex systems—where the switching equipment is generally on the premises of the local exchange rather than on that of the subscriber—generally do not, as yet, provide

for a charge which is separate and distinct from that for local telephone service. *Until* such a separation is made, this exemption, therefore, will not apply in the case of Centrex service." H.R. Rep. No. 433, 89th Cong., 1st Sess. 31 (1965), 1965 U.S. Code Cong. & Admin. News 1645, 1677 (emphasis supplied).*

This paragraph from the Congressional Committee reports is no more mandatory than the statute itself. The word "until" which appears in the Committee reports, like the word "unless" which is used in the statute itself, is conditional, not mandatory. *See, e.g.*, 2 Oxford English Dictionary 3549-50 (Compact ed. 1971); Webster's New International Dictionary 2513 (3d ed. 1971). The courts have uniformly held that the term "until", like the term "unless", is conditional rather than mandatory.**

This uniform judicial holding is strikingly illustrated by *Hughes v. United States*, 342 U.S. 353 (1952). In that case an antitrust consent decree required Howard R. Hughes, within one year, to dispose of his stock in a certain corporation or to place the stock in a voting trust "until Howard R. Hughes shall have sold" his stock. The Government argued that this provision should be read as requiring Hughes to dispose of the stock within a reasonable time—precisely the meaning which plaintiffs would give the word "until" in the Congressional Committee reports. The Supreme Court unanimously held that the decree embodied no such mandate, stating that the words "until Howard R. Hughes shall have sold" his stock "would ordinarily mean

* Identical language (except for the addition of the words "both the House bill and" in the first sentence) appears in the Senate report. S. Rep. No. 324, 89th Cong., 1st Sess. 36 (1965), 1965 U.S. Code Cong. & Admin. News 1690, 1726.

** For example, a transfer of property to a widow "until she remarries" imposes no obligation upon the widow to remarry (or not to remarry). *See, e.g., Irwin v. Irwin*, 179 A.D. 871, 167 N.Y.S. 76 (2d Dep't 1917); Restatement, Property § 44, Comment f (1936).

that Hughes, not the Court, could decide whether his stock should be sold." 342 U.S. at 350.

Thus the Congressional Committee reports on the 1965 Act do not contain any suggestion of a mandate to establish separate Centrex station charges. There is likewise no suggestion of any mandate in the Congressional debates on the 1965 Act. On the contrary, statements made in the Congressional debates on the Act make it clear that, although Congress hoped and anticipated that the projected overall repeal of the Federal communications excise tax would not be followed by offsetting telephone rate increases, it recognized that this question was subject to the jurisdiction of the regulatory authorities.* *See, e.g.*, 111 Cong. Rec. 12330 (1965) (remarks of Rep. Pucinski); 111 Cong. Rec. 13624-25 (1965) (remarks of Sen. Long).

Thus the legislative history of the Excise Tax Reduction Act of 1965, like the language of the Act itself, makes it abundantly clear that Congress did not intend to mandate the establishment of separate Centrex station charges for exchange access and for intercommunication, but rather left this question, and all other questions involving charges for telephone service, to the jurisdiction of the appropriate regulatory authorities.**

* Although these statements dealt with the projected repeal of the Federal communications excise tax as a whole, rather than with the "private communication service" exemption, as the District Court noted (182a), they confirm that Congress, in enacting the Excise Tax Reduction Act of 1965, recognized that charges for telephone service are subject to the jurisdiction of the appropriate regulatory authorities, and did not intend to issue any mandate to such regulatory authorities.

** Plaintiffs attempt to bolster their mandate theory by quoting a hearsay account of certain statements supposedly made by Dr. Laurence N. Woodworth, then Chief of Staff of the Joint Congressional Committee on Internal Revenue Taxation, at an initial meeting between AT&T personnel and staff personnel of the Joint Committee, the Treasury Department, and the IRS on November 9, 1964 (Pl. Br. 80-83). As the District Court correctly held (145a-146a n.61), such informal and off-the-record discussions are not relevant as evidence of the meaning of the 1965 Act. Indeed, we have

D. When Congress Has Intended to Prescribe the Public Utility Rate Consequences of a Revenue Measure, It Has Done So in Clear and Unambiguous Statutory Language

When Congress has intended to prescribe the public utility rate consequences of a revenue measure—in contrast to the Excise Tax Reduction Act of 1965—it has done so in clear and unambiguous statutory language.

In 1962 Congress enacted the so-called “investment tax credit”, providing for a credit against Federal income taxes of a percentage of the taxpayer’s investment in certain “qualified” property. 76 Stat. 962, 963, 966, 967 (1962), as amended, 26 U.S.C. §§ 38, 46-48. Although the purpose of the investment tax credit was to stimulate investment by helping to generate funds for new investment, some Federal and State regulatory commissions began to deduct the full amount of the investment tax credit from Federal income taxes in determining a utility’s cost of service in rate proceedings. In response to this problem, Congress enacted Section 203(e) of the Revenue Act of 1964, 78 Stat.

found no case in which a party has attempted to use such informal discussions as evidence of legislative intent, and plaintiffs have cited no such case (see Pl. Br. 82 n.26). Cf., e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring).

Moreover, the full facts relating to the discussions between AT&T personnel and the Joint Committee Staff actually reinforce the conclusion that the Excise Tax Reduction Act of 1965 did not contain any mandate to establish separate Centrex station charges. In December 1964, after the meeting of November 9, 1964 which is stressed by plaintiffs, Dr. Woodworth inquired how much revenue loss to the Government would be involved if the defendant operating companies were to establish a “separate charge” for Centrex service, and how long it might be before a “separate charge” was established (E932, E937). By a letter dated December 17, 1964, Victor E. Ferrall, Esq., then the General Tax Attorney of AT&T, informed Dr. Woodworth that there were no present plans to amend the Centrex tariffs of the defendant operating companies to establish separate Centrex station charges (E937-E938). This exchange makes plain that, far from wishing to mandate the telephone companies to establish separate Centrex station charges for exchange access and for intercommunication, Dr. Woodworth was concerned how much tax revenue the Government would lose if they did so.

35 (1964), 26 U.S.C. § 38 note, which declared the Congressional purpose and barred Federal regulatory agencies from adopting this treatment.

Although Section 203(e) of the Revenue Act of 1964 by its terms applied only to Federal regulatory agencies, the argument was advanced that its express declaration of the Congressional policy also constituted an implied mandate to State regulatory commissions. This argument was consistently rejected by the courts. *See, e.g., Williams v. Washington Metropolitan Area Transit Comm'n*, 415 F.2d 922, 961 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969); *Pacific Telephone and Telegraph Co. v. Public Utils. Comm'n*, 62 Cal. 2d 634, 672, 401 P.2d 353, 376-77, 44 Cal. Rptr. 1, 24-25 (1965); *City of Pittsburgh v. Pennsylvania Public Util. Comm'n*, 208 Pa. Super. 260, 273-74, 222 A.2d 395, 402 (1966). The courts reasoned that if Congress had wished to issue such a mandate to State regulatory authorities, it would have done so expressly and not by implication.

During the 1960's Federal and State courts were likewise considering the analogous question whether the accelerated depreciation provision of the Internal Revenue Code, 68A Stat. 51 (1954), 26 U.S.C. § 167(b), permitted Federal and State regulatory commissions to deduct the benefits of accelerated depreciation in setting rates. The courts uniformly held that this "flow through" treatment was permissible. *See, e.g., City of Chicago v. FPC*, 385 F.2d 629, 635 (D.C. Cir. 1967), *cert. denied sub nom. Public Serv. Comm'n v. FPC*, 390 U.S. 945 (1968); *Alabama-Tennessee Natural Gas Co. v. FPC*, 359 F.2d 318, 331 (5th Cir.), *cert. denied*, 385 U.S. 847 (1966); *Central Maine Power Co. v. Public Utils. Comm'n*, 153 Me. 228, 247-49, 136 A.2d 726, 738-39 (1957). Like the courts that had considered the corresponding question with respect to the investment tax credit, these courts reasoned that if Congress had intended to mandate the regulatory treatment of Federal tax legislation, it would have done so by explicit statutory language.

By 1969 Congress had determined to put an end to the "flow through" treatment of accelerated depreciation by Federal and State regulatory commissions. It was initially proposed that Congress simply prohibit such treatment by both Federal and State regulatory agencies by enacting a statute similar to Section 203(e) of the Revenue Act of 1964. However, Chairman Wilbur Mills of the House Ways and Means Committee expressed doubt about the constitutionality of such a mandate to State regulatory commissions. *Hearings on the Subject of Tax Reform Before the House Committee on Ways and Means*, 91st Cong., 2d Sess., Pt. 11, at 3849 (1969). Accordingly, the measure ultimately enacted by Congress, Section 441 of the Tax Reform Act of 1969, 83 Stat. 625 (1969), 26 U.S.C. § 167(l), did not purport to prohibit "flow through" directly, but contained a detailed set of provisions the effect of which was to deny accelerated depreciation to utilities not already employing "flow through" unless they thereafter used a prescribed method for calculating their Federal income taxes, and their cost of service for ratemaking purposes was calculated on the same basis by the appropriate regulatory agency. A similar provision was enacted with respect to the investment tax credit in 1971. 85 Stat. 504 (1971), as amended, 26 U.S.C. § 46(f).

The history of Congressional legislation with respect to the investment tax credit and accelerated depreciation shows very clearly that when Congress has in fact intended to mandate the public utility rate treatment of a Federal tax measure, it has done so explicitly by clear statutory language. The history of such legislation also shows that Congress has shied away from direct mandates to State public utility commissions.

**E. The Constitutional and Other Arguments
Relied Upon by Plaintiffs Do Not Support
Plaintiffs' Mandate Theory**

Plaintiffs argue at length that their theory of a Congressional mandate must be accepted because otherwise the

Excise Tax Reduction Act would give the defendant operating companies "an unrestricted license on when and if to tax their customers" in violation of the constitutional rule against delegation of the taxing power (Pl. Br. 77-78, 84-90). This argument, as the District Court correctly held (183a-188a), is erroneous.

In the first place, plaintiffs' argument proceeds on an entirely fallacious premise. The Excise Tax Reduction Act does not give any of the defendants an "unrestricted license" to determine whether or not a separate charge will be established for Centrex intercommunication service. Rather, the Act leaves this question to be determined by the appropriate State or local regulatory authorities pursuant to the applicable State laws (*see pp. 10-13 supra*).

In the second place, quite aside from its invalid premise, plaintiffs' argument of unconstitutional delegation is untenable. Simply stated, plaintiffs' argument is that if a taxing statute provides that the taxability of a transaction depends upon the manner in which the transaction is structured, it constitutes an unconstitutional delegation of legislative power to the party structuring the transaction. Under this argument, all of the many sales and excise tax statutes under which the taxability of various items turns on the existence of a separate charge for such items would be unconstitutional.* So would all of the provisions of the Internal Revenue Code under which the incidence of Federal income taxation depends upon the manner in which a transaction is structured.**

* Numerous sales and excise tax statutes and regulations make the taxability of various items depend upon whether a separate charge is stated for such items. *See, e.g.*, Idaho Code § 63-3613(b)(1); Md. Ann. Code, Art. 81, § 324(i)(1)-(4); Minn. Stat. § 297A.01(8); Neb. Rev. Stat. § 77-2702(4)(c)(iii), (iv), (15)(b)(iii), (iv); N.Y. Tax Law § 1101(b)(3).

** Thus, for example, spouses entering into written separation agreements may specify how amounts paid under the separation agreement are to be divided between alimony and child support (26 U.S.C. § 71(a), (b)); individuals furnishing over half of the sup-

In all of these cases, as the District Court held (184a-186a), there is no delegation of legislative power at all. Congress has fully exercised its legislative power by specifying what the tax consequences of a given type of transaction will be. The fact that Congress has left to others the power to decide which types of transactions will be entered into does not mean that Congress has delegated any of its legislative power to determine the tax consequences of different types of transactions.

Arguments of unconstitutional delegation like that made by plaintiffs here have consistently been rejected by the courts. In *Phillips v. Commissioner*, 283 U.S. 589 (1931), for example, the taxpayer contended that to permit State law to determine the extent of transferee liability for Federal taxes would constitute an unconstitutional delegation. The Supreme Court rejected this contention in an unanimous opinion by Justice Brandeis, stating:

"The extent and incidence of Federal taxes not infrequently are affected by differences in state laws; but such variations do not infringe the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. [Citations omitted.] . . ." 283 U.S. at 602.

In *Helvering v. Lerner Stores Corp.*, 314 U.S. 463 (1941), the taxpayer contended that to permit a corporation to specify the value of its stock for tax purposes would constitute an unconstitutional delegation. The Court likewise rejected this argument, stating:

port of a third person may agree to designate one of them to claim the supported person as a dependent (26 U.S.C. § 152(c)); the manner in which a corporate reorganization is structured will determine whether or not the reorganization is tax-free (26 U.S.C. § 368); and, with certain exceptions, elections made by a partnership for tax purposes are binding upon all of its general and limited partners (26 U.S.C. § 703(b)). These are only illustrative examples of the myriad situations under the Internal Revenue Code in which the taxability of a transaction depends upon the manner in which the transaction is structured.

"There is present no unlawful delegation of power. Congress has prescribed the method by which the taxes are to be computed. The taxpayer here is given a choice as to value. While the decision which it makes has a pronounced effect upon its tax liability, that is not uncommon in the tax field. Congress has fixed the criteria in light of which the choice is to be made. The election which the taxpayer makes cannot affect anyone but itself." 314 U.S. at 468.

Accord, e.g., Rochester Gas & Electric Corp. v. McGowan, 115 F.2d 963, 955 (2d Cir. 1940).

Seizing upon the last sentence quoted above from *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941), plaintiffs argue that the foregoing cases establish only that it is not an unconstitutional delegation to permit a taxpayer to affect its own tax liability by the manner in which it structures a transaction, and further argue that it would be an unconstitutional delegation to permit a private party to affect anyone else's tax liability by the manner in which that party structures a transaction (Pl. Br. 87-90). The fact is that the manner in which one party structures a transaction very often determines the tax consequences of that transaction for other parties.* No court has ever held that this violates the rule against delegation of the taxing power. In all such cases, as the District Court held (184a-

* For example, certain tax-free reorganizations (26 U.S.C. § 368) require that "substantially all" of the properties of the acquired corporation be received by the acquiring corporation, a term which the Internal Revenue Service construes for rulings purposes as 90% of net assets (Rev. Proc. 77-37, 1977-41 I.R. Bull. 17, § 3.01), so that if shareholders who dissent and exercise appraisal rights receive cash from the corporation constituting more than 10% of the corporation's net assets, all shareholders may be denied tax-free treatment; with certain exceptions, elections made by a partnership for tax purposes are binding upon all of its general and limited partners, whether or not they concurred in the election (26 U.S.C. § 703(b)); the sale or exchange by one or more partners of more than 50% of the capital and profits of a partnership is deemed to terminate the partnership for tax purposes (26 U.S.C. § 708(b)(1)(B)); transfer of stock in a Subchapter S corporation to a partnership or corporation ter-

185a), Congress has fully exercised the taxing power by determining which transactions, facilities, or services will be taxed and at what rates.

In a further effort to bolster their mandate theory, plaintiffs argue that defendants should be subjected to liability because they "fostered" the Excise Tax Reduction Act of 1965, citing *Blair v. City of Chicago*, 201 U.S. 400 (1906) (Pl. Br. 92). But, as the District Court pointed out (187a & n.117), the holding of the *Blair* case is limited to private bills, while the Excise Tax Reduction Act is a revenue enactment of general application.

F. Conclusion

For all the reasons set forth in Points II(A) through II(E) above, the Excise Tax Reduction Act of 1965 does not embody any mandate to establish separate Centrex station charges for exchange access and for intercommunication.*

POINT III

Plaintiffs' Claim of Collection of Excessive Federal Communications Excise Taxes May Be Maintained Only Against the United States.

In its opinion granting defendants' motion for partial summary judgment dismissing Counts II, IV, and VI of plaintiffs' complaint (190a-218a), the District Court held

minates its Subchapter S status (26 U.S.C. § 1372(e)(3)); and an accrual basis corporation may pay a bonus or dividend in the year it is declared or in the following year without affecting its own tax situation, but the time of receipt will determine the year of taxation for a cash basis recipient (see 26 U.S.C. § 451(a)).

* In addition to their failure to demonstrate that the Excise Tax Reduction Act of 1965 contained any mandate to establish separate Centrex station charges, plaintiffs have failed to demonstrate that Congress intended to confer upon the limited class of taxable Centrex customers any private cause of action for damages for failure to comply with the alleged mandate. (Because of its holding that there was no mandate, the District Court did not reach this issue (180a n.99).) No private cause of action for damages is conferred by the Excise Tax Reduction Act of 1965, and no such cause of action may properly be

that a claim of collection of excessive Federal communications excise taxes may be brought only against the United States, and may not be brought against private collectors which have paid such taxes over to the United States. Although plaintiffs challenge this holding (Pl. Br. 94-99), it was in accord with the unanimous holdings of prior cases, and was plainly correct.

The Federal communications excise tax is imposed upon the customers who pay for the communications services subject to the tax (in this case, the members of the plaintiff class). 26 U.S.C. § 4251(a)(1). The tax is required by law to be collected by the persons receiving the payment for the services (in this case, the defendant operating companies). 26 U.S.C. § 4291. It is undisputed that all of the Federal communications excise taxes at issue in the present case were duly and timely paid over to the United States by the defendant operating companies which collected such taxes (425a). In collecting such taxes and paying them over to the United States, as the District Court held (212a), the defendant operating companies acted solely as collecting agents for the United States.

Section 7422(f)(1) of the Internal Revenue Code, 26 U.S.C. § 7422(f)(1), provides that "[a] suit or proceeding referred to in subsection (a) may be maintained only against the United States" Subsection (a) of Section 7422, 26 U.S.C. § 7422(a), refers broadly to any

"suit or proceeding . . . in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected"

implied in view of the fact, among others, that the regulation of telephone rates and service has traditionally been recognized as the concern of State and local regulatory authorities. Cf., e.g., *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 478 (1977); *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 40-41 (1977); *Cort v. Ash*, 422 U.S. 66, 78-85 (1975).

As the District Court found (199a), the language of Section 7422(a) exactly describes Counts II, IV, and VI of plaintiffs' complaint. Section 7422(f)(1) therefore provides that the claims asserted in Counts II, IV, and VI "may be maintained only against the United States"

Every judicial decision in point has held, in accordance with the plain terms of Section 7422(f)(1), that actions to recover alleged collections of excessive Federal taxes must be brought against the United States and not against the private collectors which have paid the taxes over to the United States.** *McDonnell Douglas Corp. v. General Telephone Co. of California*, C.D. Cal., Civil Action No. 74-378-F, July 7, 1975, *appeal pending*, 9th Cir., No. 75-3131; *Econ, Inc. v. Illinois Bell Telephone Co.*, 351 F. Supp. 1087, 1089 (N.D. Ill. 1972); *Rose v. American Airlines, Inc.*, 331 F. Supp. 77, 79 (N.D. Ill. 1971); *Agron v. Illinois Bell Telephone Co.*, 325 F. Supp. 487, 488 (N.D. Ill. 1970), *aff'd on*

* Plaintiffs argue that Section 7422(f)(1) only bars tax refund suits against Federal employees, relying upon the fact that suits against private collectors are not mentioned in the legislative history of Section 7422(f)(1) (Pl. Br. 97-98). However, as the District Court held (200a-201a), the language of Section 7422(f)(1) contains no such limitation, and its legislative history makes clear that Congress never contemplated that a tax refund action might be brought against anyone other than the United States or an employee of the United States.

Plaintiffs' argument, moreover, would render the words "may be maintained only against the United States" superfluous in Section 7422(f)(1), because Section 7422(f)(1) also expressly provides that tax refund actions "may [not] be maintained . . . against any officer or employee of the United States (or former officer or employee) or his personal representative. . . ." Such a construction would contravene the principle that Congress is not presumed to have used superfluous words in a statute. *Cf., e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Platt v. Union Pacific R.R.*, 99 U.S. (9 Otto) 48, 58-59 (1878).

** As the District Court observed (201a n.21), cases under other taxing statutes likewise hold that a collecting agent is not liable to the taxpayer for an alleged excessive collection of tax which has been paid over to the government. *See, e.g., John L. Burns, Inc. v. Gulf Oil Corp.*, 268 F. Supp. 222, 223 (N.D. Ga. 1967); *Kesbec, Inc. v. McGoldrick*, 278 N.Y. 293, 297, 16 N.E.2d 288, 290 (1938); *cf., e.g., Hodgman Rubber Co. v. Dumaine*, 93 F.2d 165 (1st Cir. 1937).

other grounds, 449 F.2d 906, 914 (7th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

As the District Court outlined (196a-198a, 202a-203a), the Internal Revenue Code provides a carefully articulated statutory scheme for the bringing of tax refund actions, and the courts have repeatedly held that this statutory remedy is exclusive. *See, e.g., United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272-73 (1931); *Kings County Savings Institution v. Blair*, 116 U.S. 200, 205-06 (1886). If plaintiffs were allowed to bring an action against the defendants for alleged collection of excessive taxes, and the defendants were allowed to bring a third-party claim against the United States, plaintiffs would have succeeded in avoiding the statutory prerequisites for the maintenance of a refund action against the United States (204a). On the other hand, if plaintiffs were permitted to bring such an action against defendants, and defendants were not permitted to bring a third-party claim against the United States, defendants would be held liable for the collection of taxes which defendants had already paid over in full to the United States, as defendants were required by law to do, without any redress against the United States. Such a result would be strikingly unjust.

Plaintiffs argue that they are entitled to sue the defendants for alleged collection of excessive Federal communications excise taxes under Section 6415(e) of the Internal Revenue Code (Pl. Br. 95-97). Section 6415 of the Internal Revenue Code is a special administrative provision applicable solely to communications and transportation excise taxes. Section 6415(a) and (b) deal with refunds and credits by the Government to persons required to collect such excise taxes. Section 6415(e) provides that any person required to collect the tax who has made an overcollection of tax "shall, upon proper application, refund such overcollection to the person entitled thereto."

On its face, as the District Court held (205a), Section 6415(c) does not create a cause of action for recovery of an overcollection by a taxpayer from a collecting agent.* Moreover, as the District Court explained (206a-210a), the history of Section 6415 and its predecessor statutes and the regulations thereunder, dating back to 1921, demonstrates that the purpose of Section 6415(c) is to permit collecting agents to make refunds in those cases where they are authorized to take credits upon a subsequent return filed with the Government. Under regulations promulgated in 1942 (which plaintiffs concede are still in effect (Pl. Br. 97)), such credits may be taken only where the overcollection was due to a "clerical or mechanical error." Treas. Reg. 42, §§ 130.77, 130.78 (1942). In all other cases, the regular statutory refund procedure must be followed. *Ibid.* Under no circumstances does Section 6415(c) authorize a refund action against a collector which has paid over to the Government the full amount of the taxes in issue.

Plaintiffs appear to concede that the District Court was correct in holding that under the Internal Revenue Code of 1939 and its predecessors, a collecting agent was permitted to make a refund under the predecessor of Section 6415(c) only where it was authorized to take a credit on a subsequent return, *i.e.*, only in a case of "clerical or mechanical error" (Pl. Br. 96). However, plaintiffs argue that the Internal Revenue Code of 1954 completely changed this pattern, and authorized a collecting agent to make a refund under Section 6415(c) whether or not it was permitted to take a credit on a subsequent return (Pl. Br. 96-97). This argument is refuted by the detailed technical explanations of the 1954 Code given in the House and Senate reports, which made clear that Section 6415 of the 1954 Code differed from prior law only with respect to

* Section 7422(f)(1), by contrast, plainly and unequivocally bars a tax refund action against any defendant other than the United States.

one aspect of the treatment of the Federal excise tax on admissions and club dues. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A412-A413 (1954), 1954 U.S. Code Cong. & Admin. News 4017, 4560; S. Rep. No. 1622, 83d Cong., 2d Sess. 582-583 (1954), 1954 U.S. Code Cong. & Admin. News 4621, 5231.

Since Section 6415 of the Internal Revenue Code applies solely to communications and transportation excise taxes, the necessary implication of plaintiffs' argument that Section 6415(c) authorizes a tax refund action against a private collector is that such actions may be brought against private collectors of communications and transportation excise taxes, but not against the private collectors of any other Federal taxes (*see* Pl. Br. 98-99). As the District Court observed (206a), plaintiffs have suggested no reason why Congress should have wished to single out these two taxes, and only these two taxes, in this manner. All of the cases which have dealt with attempts by taxpayers to sue private collectors for refunds of communications and transportation excise taxes under Section 6415(c) have held that such a suit may be maintained only against the United States (*see* pp. 65-66 *supra*). The District Court was plainly correct in reaching the same result.*

* In light of its holding that an action to recover alleged collections of excessive Federal taxes must be brought against the United States, the District Court did not reach defendants' other defenses to Counts II, IV, and VI of the complaint. These defenses included the fact that until the establishment of separate tariff charges for exchange access and intercommunication there was no "separate charge" and therefore no collection of excessive Federal communications excise taxes, and the fact that the great majority of members of the plaintiff class did not file claims for refund with the IRS as required by 26 U.S.C. § 7422 (a) (288a-292a, 299a-300a). As explained in defendants' Memorandum of Law in Support of Motion for Partial Summary Judgment (Record Item 326), pp. 16-22, all of the cases in which the issue has arisen have held that all of the members of the purported plaintiff class in a tax refund action (and not merely the named plaintiffs) must satisfy the refund claim requirement of 26 U.S.C. § 7422(a).

POINT IV

If Plaintiffs Are Held to Be Entitled to Bring an Action Against Defendants for Alleged Collection of Excessive Federal Communications Excise Taxes, Defendants' Third-Party Complaint Against the United States Should Be Reinstated.

In order to protect their right to assert a claim over against the United States in the event that the plaintiffs should be held to be entitled to bring an action against defendants for alleged collection of excessive Federal communications excise taxes, the defendant operating companies filed protective claims for refund with the Internal Revenue Service (271a-273a, 276a-279a), and the defendants served and filed a third-party complaint upon the United States (61a-64a).

The United States moved for summary judgment dismissing the third-party complaint on the ground that the refund claims filed by the defendant operating companies did not show that they had refunded the taxes in issue to the customers or obtained the customers' consent (267a-279a), and it was in response to this motion that defendants moved for partial summary judgment dismissing the tax refund claims (Counts II, IV, and VI) of plaintiffs' complaint (280a-292a). Having granted defendants' motion for partial summary judgment dismissing Counts II, IV, and VI of the complaint, the District Court was not required to, and did not, pass upon the Government's motion for summary judgment dismissing the third-party complaint insofar as it was based upon those counts of the complaint (215a).*

Defendants filed a notice of appeal from the final judgment of the District Court, which embodied the dismissal of

* The District Court held that the third-party complaint should be dismissed for lack of subject matter jurisdiction insofar as it was based upon Counts I, III, and V of plaintiffs' complaint, which embody plaintiffs' mandate theory (216a-218a). Defendants do not challenge this holding.

the third-party complaint (241a-242a). If for any reason the District Court's dismissal of Counts II, IV, and VI of the complaint should not be affirmed, defendants submit that the Court should likewise vacate the judgment dismissing the third-party complaint insofar as it was based upon Counts II, IV, and VI of the complaint.*

* Since the District Court did not pass upon the Government's motion for summary judgment dismissing the third-party complaint insofar as it was based upon Counts II, IV, and VI of the complaint, this Court need not pass upon the issues raised by that motion upon the present appeal. If for any reason this Court should desire to review the issues raised by the Government's motion, defendants' legal position on that motion is set forth in their Memorandum of Law in Opposition to Government's Motion for Summary Judgment, dated January 7, 1977 (Record Item 332).

The District Court did hold that 28 U.S.C. § 2006, upon which defendants relied in opposing the Government's motion, does not apply to private collectors (217a-218a & n.46). Defendants submit that 28 U.S.C. § 2006 was intended to protect all collectors who are required to pay over to the Treasury the taxes they collect. *See George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 380-81 (1933). Therefore, if plaintiffs are held to be entitled to bring a tax refund action against defendants, 28 U.S.C. § 2006 should likewise protect defendants.

CONCLUSION

For the reasons given in Points I-III above, the judgment entered by the United States District Court for the Southern District of New York on August 5, 1977 should be affirmed in all respects. In the alternative, for the reasons given in Point IV above, if the judgment of the District Court is not affirmed insofar as it dismissed Counts II, IV, and VI of plaintiffs' complaint, the judgment of the District Court dismissing the third-party complaint insofar as the third-party complaint was based upon Counts II, IV, and VI of the complaint should be reversed.

Dated: New York, New York
January 3, 1978

Respectfully submitted,

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